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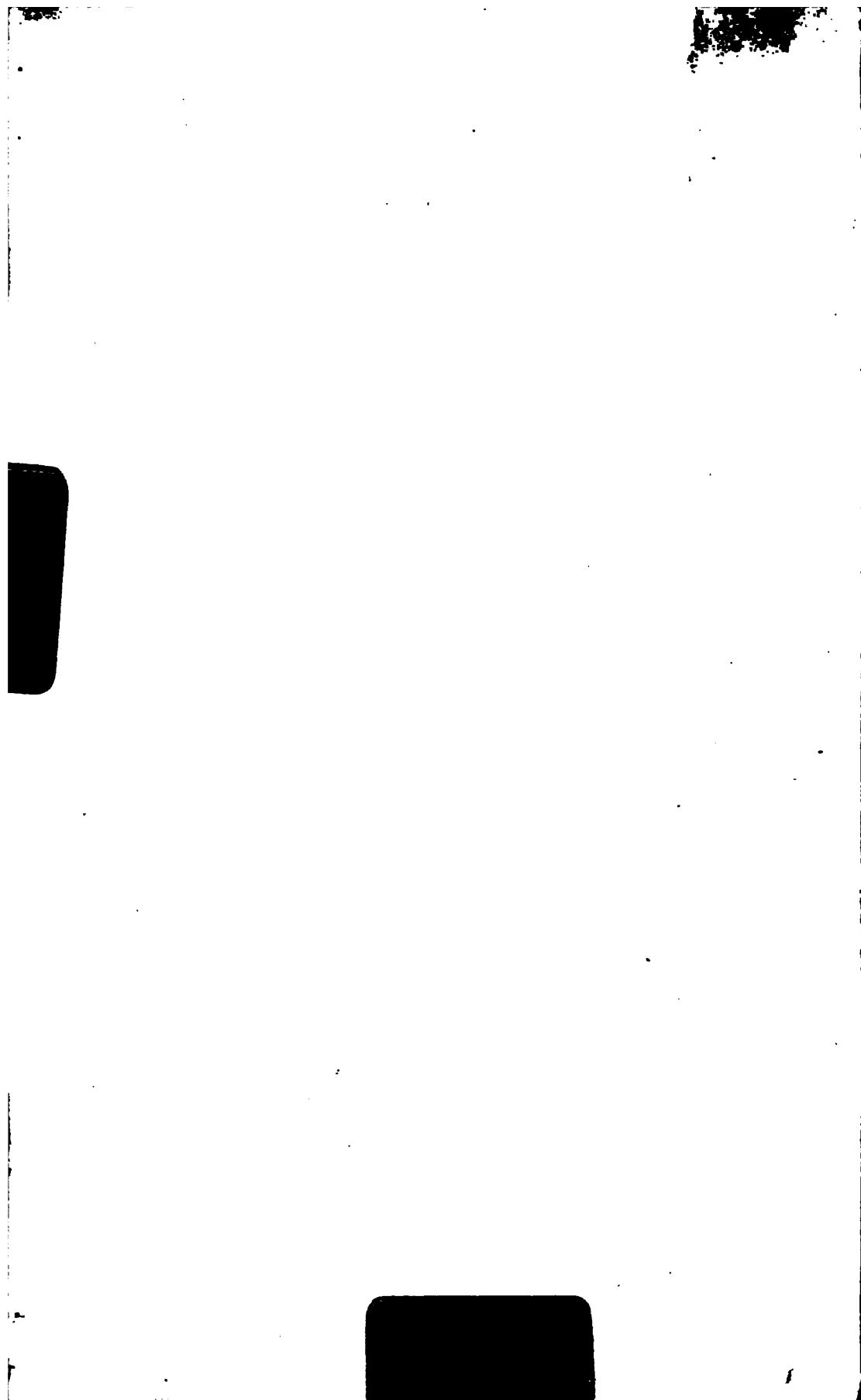
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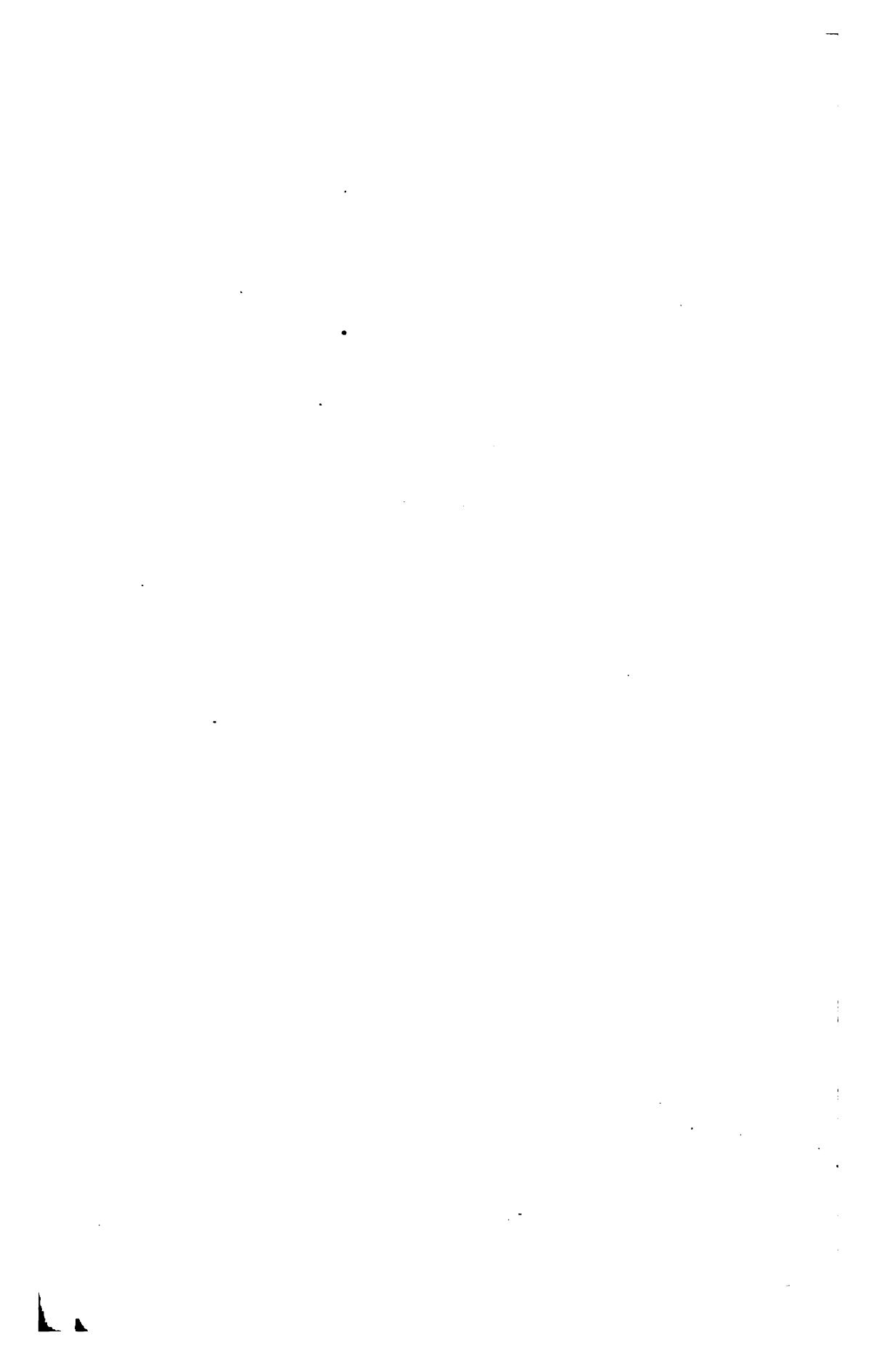
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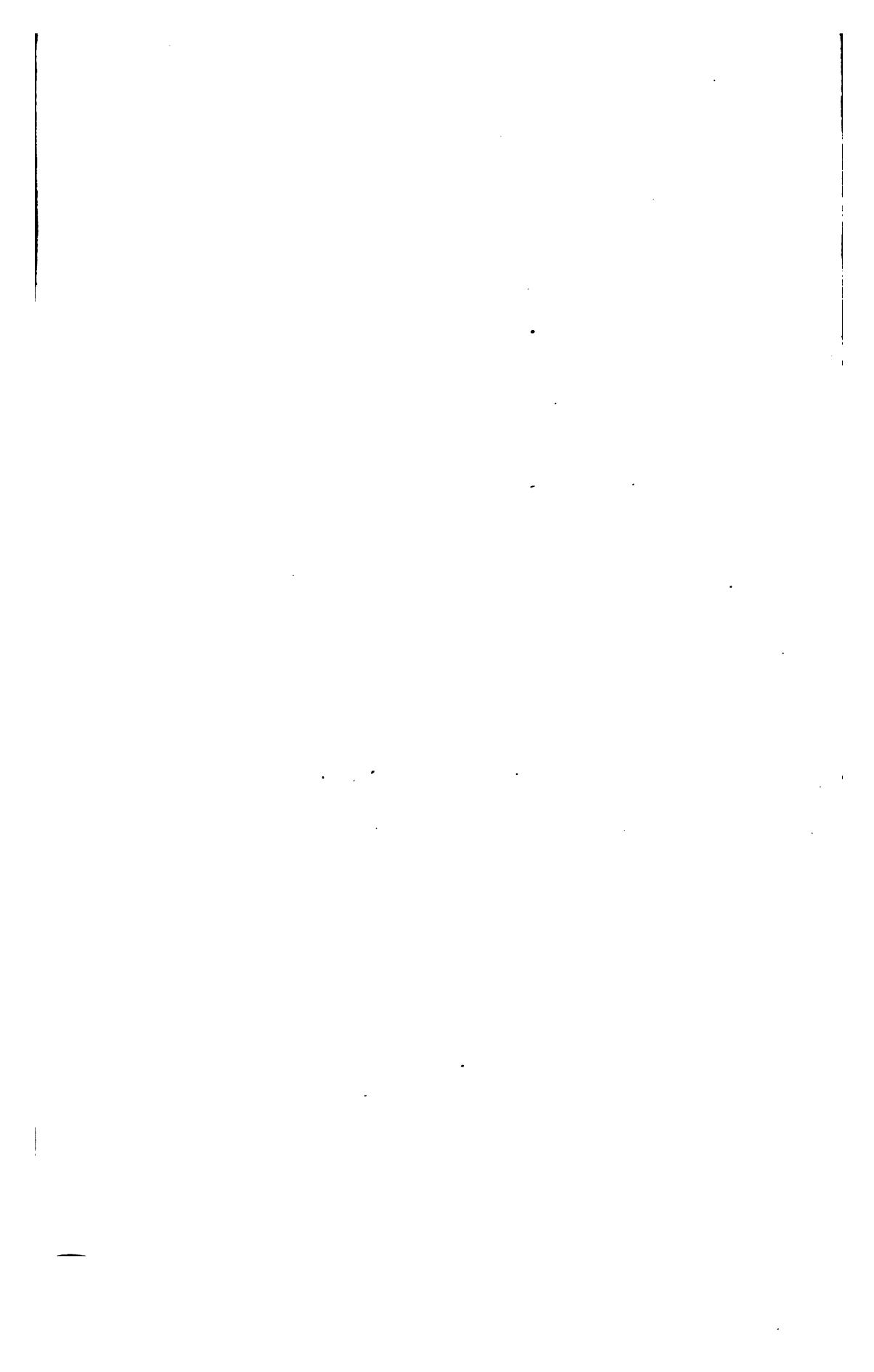
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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Arches and Prerogative Courts

OF

CANTERBURY,

AND IN THE

High Court of Delegates:

CONTAINING THE

JUDGMENTS

OF

THE RIGHT HON. SIR GEORGE LEE:

BY JOSEPH PHILLIMORE, LL.D.

ADVOCATE IN DOCTORS COMMONS,

CHANCELLOR OF THE DIOCESE OF OXFORD, AND REGIUS PROFESSOR
OF CIVIL LAW IN THE UNIVERSITY OF OXFORD.

“Σαύφασθε δὲ, εἰδὲ διοτί, οὐδὲ διπάμε τις ἡ, κύριος ἀστει τὰ αὐτοῦ διαδέσθαι, δάν μη
εἰ φροντὶ ποσοῦντα δέ, ἡ φαρμακῶντα, ἡ γυναικὶ πειθόμενον, ἡ ὑπὸ γήρως, ἡ ὑπὸ^{το}
μανιῶν, ἡ ὑπὸ ἀνάγκης τινὸς καταληφθέντα, ἀκύρον κλεβόντων μέντην δι νόμου.”—
Demosth. c. Step. 3. B. 2. Ed. Paris, 22.

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TO WHICH ARE ADDED, IN AN APPENDIX,

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CASES
IN THE
ECCLESIASTICAL COURTS,

1754 (*continued.*)

PREROGATIVE COURT OF CANTERBURY.

BROWN *against* ATKINS.

Dr. Harris, for Brown. — Brown is a creditor of William Weston, who died in the Namure in 1749 ; deceased made his will, and appointed his daughter residuary legatee. She chose Atkins, her guardian, who took administration *cum testamento*. Robert Brown, the creditor, cited him to an inventory and account. 31st July, a declaration, instead of an inventory and an account, given in ; the court ordered Atkins to be dismissed, if Brown's proctor did not object. We now offer an allegation, pleading exceptions to the account.

Michaelmas
Term,
November 7.

A creditor has a right to call for an inventory, but the Prerogative Court has no jurisdiction at the suit of a creditor to examine the particulars of an account.

Dr. Pinfold, for Atkins. — We have given in a fair declaration instead of an inventory, to which no objection is made. Brown, as a creditor, has no right to object to the account, and therefore we object to the whole allegation, as pleading a matter not cognizable by this Court.

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Term,
November 7.

JUDGMENT — SIR GEORGE LEE.

I was of opinion, a creditor has a right only to a constat of the estate by an inventory, but that I had no jurisdiction at the instance of a creditor to examine the particulars of the account, and therefore rejected the allegation, as it excepted only to the account, and not to the declaration.

November 7.

GOODMAN *against* GOODMAN and Others.

A person cannot
propound a will
in which he has
no interest ei-
ther as executor
or legatee.

Dr. Paul, for William Goodman. — Deceased died 1st March 1754; left my client, William Goodman, his brother, and Sarah Goodman, his sister; deceased made a will dated 27th February 1740, whereof his sister, Sarah Goodman, is executrix, and appointed his daughter, who died before him, residuary legatee. Sarah has propounded a schedule without date, in which she is sole executrix. We oppose it; and now offer an allegation, propounding the will of 27th February 1740; because we shall be entitled to a share of the residue if that will takes place, as the residue is a lapsed legacy by the death of the residuary legatee before the testator.

Dr. Simpson, for Sarah. — We have propounded a schedule without date, and have pleaded the will of 1740 in our allegation. We object that William has no interest as executor or as a legatee, and therefore cannot propound this paper.

JUDGMENT — SIR GEORGE LEE.

I was of opinion, as William had no interest under this will as executor or as legatee, that he

could not propound it, and if the schedule was set aside the deceased would be dead intestate, and then he would have his share of the whole estate, which would be more beneficial than a share of the residue only, and therefore I rejected the allegation.

PREROGATIVE COURT.

Michaelmas Term,
November 7.

BAGNALL *against* SIR JACOB GERARD
DOWNING, Bart.

November 7.

Sir George Downing, Bart. died in June 1749; left a natural daughter by Mrs. Townsend, his housekeeper, viz. Mrs. Bagnall; on 20th September 1717, he made his will, and gave all his real and personal estate to his cousin, Sir Jacob Downing, and made him executor; on 23d December 1727, after birth of Mrs. Bagnall, he made a codicil, and gave to Mrs. Townsend an annuity of 200*l.* for life, and a legacy of 100*l.*; and to Mrs. Bagnall he left an annuity for life of 500*l.* Sir Jacob has taken probate of said will and codicil; deceased lodged money in Mrs. Townsend's hands, which we say he intended should go to his daughter; he wrote with his own hand a paper attested by three witnesses, which is in these words:—

“January 16th, 1740.

“This is to satisfy my executor, and all other persons, that what money Mrs. Townsend, my housekeeper, has, that was mine, I gave it her for the use of her daughter, besides what I have given to her daughter by the codicil to my will.”

“Witnesses.

“G. Downing.”

“John Paine.

“David Lewis.

“Richard Lunes.”

A paper pronounced to be testamentary on the ground that it was to take effect after death. It contained a direction to the executors under the will of the deceased.

CASES DETERMINED IN THE

PREROGATIVE
COURT.

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Term,
November 7.

Sir Jacob did not prove this paper, but brought a bill in Chancery against Mrs. Townsend and her daughter, to have the money in the mother's hands paid to him, and for a discovery of the sum. This paper was hereupon produced. Lord Chancellor doubted whether it was not testamentary, and directed it to be tried here; Bagnall thereupon cited Sir Jacob to take an additional probate with this paper. We have pleaded the deceased's declarations, that he meant the money in Townsend's hands for Bagnall; they say Sir George meant this paper only as a declaration of what money was in Townsend's hands.

Dr. Paul, for Sir Jacob Downing. — Deceased gave Mrs. Townsend 200*l.* annuity, the furniture of her room, and 100*l.* legacy. On 9th June 1749, Sir George died, after his death the will and codicil were found in his custody. Townsend present at finding them, but said nothing of this paper. On 13th June, Sir Jacob proved the will and codicil without opposition. No pretence then of any other testamentary paper; he filed a bill in Chancery for a discovery, and then Townsend produced this paper; the question is, whether this paper be testamentary or not; deceased, though pressed by Townsend, refused to make a new will or codicil. We might object to Townsend's evidence, because she is a trustee for Bagnall.

Witnesses for Bagnall.

1. Mary Townsend. — Deponent was house-keeper to deceased for thirty years before, and to his death; 16th January 1740, he, in deponent's presence, wrote and signed the paper pleaded by Bagnall, and then executed it; cannot be certain

but believes the witnesses saw him sign it; deceased delivered it to deponent and bid her take care of it, and said, "Life is uncertain; I hope you will not have any trouble, but if you should, this will secure the notes I have given you for Polly." The deponent several times told the deceased she wished he would secure the notes for Polly some other way, for she was afraid she should have trouble after his death; he replied, he knew of no other way, and said, the paper he had given her would secure at his death the money and notes he had or should give her, and was in her hands at his death, and that he could give all he had by such a paper, and said, if he should give deponent but 100l. a-year, she would live on it, but Polly must not live so; and made strong declarations of affection to deponent and her daughter; deceased said, wills might be burnt, and he did not know any safer way than giving it his daughter by the paper in the deponent's custody; in the time of the rebellion, the deponent hid the money and notes; but deceased thought deponent did not hide it safely, and he sent for deponent's brother, and bid him hide it, and said it was his daughter's money.

2. Richard Lunes. — Deponent is a witness to the paper pleaded; Paine had signed it when deponent came into the room; deponent does not remember he saw deceased sign it.

Witnesses for Sir Jacob Downing.

1. John Paine. — Deponent is a subscribing witness to the paper pleaded; he did not apprehend deceased wrote or signed it as a testamentary paper, by reason he did not publish it as such, but after deceased had signed it he said to deponent in presence of the other subscribing wit-

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nesses, "Paine, this is to satisfy my executors that some money, which Mrs. Mary has of mine in her keeping in case of my death, is for her and her daughter's use till such time as their annuities become payable ;" deponent believes deceased meant said notes as a declaration of trust only, as to what money said Mary Townsend had at that time of his in her hands, and not as a testamentary paper, and as such a declaration of trust, deponent then took said paper to be.

2. Int. Deponent is a riding-officer of the customs, and has 12*l.* a-year from Sir Jacob Downing.

2. David Lewis. — Deponent was servant to deceased thirty years before, and to his death ; deponent did not apprehend deceased wrote the paper pleaded as a testamentary paper, because he did not publish it ; but deceased immediately after he had signed it, declared that said paper was only to secure some money which Mrs. Mary then had of his in her hands, in case of his death, for her and her daughter's subsistence till their annuities were payable ; from such declaration deponent believes deceased intended such paper as a memorandum only, as to what money said Mary Townsend then had of his in her hands, and not as a testamentary paper, and as such deponent then took it to be.

Read orders of the Court of Chancery for the parties to take the opinion of the Prerogative Court, whether such paper was testamentary or not.

Dr Simpson's argument for Bagnall. — There is no question as to the will and the first codicil ; we have cited Sir Jacob to take an additional probate with this paper as a codicil, this paper was wrote in contemplation of death, it amounts to a direc-

tion to the executor not to demand the money of Townsend; it was to give satisfaction to the executor, and therefore was to take place at his death; he mentions the legacy given to his daughter by his codicil; none of the witnesses say the paper was intended as an absolute gift *inter vivos*; no declaration contrary to what appears on the paper can be received in evidence.

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November 7.

Drs. Pinfold and Hay, same side.—Delegates; *Garden against the Earl of Orrery and others*; this paper alters the will and codicil, by revoking in part the will and codicil as to the residue, and therefore is testamentary.

Dr. Paul, contra, for Sir Jacob. — Testator must have *animus testandi*; Calvin's Lexicon, f. 305. *donatio mortis causa et legatum*, differ.

JUDGMENT—SIR GEORGE LEE.

I was of opinion the paper was testamentary. The witnesses shew that the deceased intended it should take effect after his death, and upon the face of the paper it is a direction to his executor; it refers to his will and codicil, and gives the money in Townsend's hands in trust for her daughter, besides what he had given to said daughter by his codicil which had been proved. I therefore pronounced for the paper pleaded as a codicil, and assigned Sir Jacob Downing to take an additional probate of that paper by the 3rd session of this term. — No Costs.

(a) *Garden v. The Earl of Orrery and others*, Deleg. 17th Dec. 1745. The question arose respecting a codicil to the will of the Duke of Buckingham and Normanby. The Judges present at the sentence were — Mr. Justice Burnett, Mr. Baron Clarke, Dr. Audley, Dr. Pinfold, jun., Dr. Walker, and Dr. Collier.

ARCHES COURT OF CANTERBURY.

HILLYER against MILLIGAN.

2d Session,
Michaelmas

Term,
November 12.

The chancellor
of Lincoln can-
not exercise ju-
risdiction within
the jurisdiction
of the Archdea-
con and Commis-
sary of Bucking-
hamshire.

Dr. Paul, for Milligan.—This cause begun in the Consistory Court of Lincoln. Suit was brought there by Milligan, farmer of the tithes of Hanslop, in the county of Bucks, against Hillyer, an inhabitant of said parish, for tithes arising there, within the archdeaconry and commissaryship of Bucks. Hillyer appeared under protestation, and alleged he was subject only to the commissary of Bucks, in the diocese of Lincoln. There are six archdeaconries and a commissary in each; they are instituted cumulative, not exclusive of the chancellor. No suit was commenced before the commissary of Bucks when this suit was brought before the chancellor of Lincoln. The chancellor pronounced for his jurisdiction, and ordered Hillyer to appear absolutely.

Dr. Simpson, same side.—Citation returned the 22nd October, 1752. Hillyer alleged he was resident in Bucks, and not subject to the chancellor's jurisdiction. Milligan insisted Hillyer was subject to both jurisdictions. Chancellor decreed Hillyer to appeal absolutely from that decree; he has appealed. We have in this Court pleaded and exhibited the chancellor's and commissary's patents. By the chancellor's patent, general jurisdiction in all ecclesiastical causes throughout

the diocese of Lincoln is granted to him by the commissary's patent; the same jurisdiction, except as to giving institutions, &c., is granted to him, in the county of Bucks; in 1294, a very full patent was granted to the chancellor, and the same year, the bishop appointed a commissary to go on with causes in the absence of the chancellor; in 1352 and 1405, commissioners appointed to grant probates of wills, &c.; in 1598, the chancellor holding his court at Godmanchester, in Huntingdonshire, tried a cause between two inhabitants of Bucks; in June, 1600 the same; about the same time, a clergyman of Bucks was prosecuted before the chancellor at Godmanchester; the chancellor in like manner took cognizance of causes arising within other archdeaconries in the diocese of Lincoln.

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Dr. Pinfold, for Hillyer.—Both the parties live at Hanslop, in Bucks, and the suit is for tithes arising there; in our protest we said that Dr. Bettsworth, as commissary, has the whole episcopal jurisdiction in Bucks by patent, and that we were not cited during an inhibition, for that the inhibition in 1752, during the bishop's visitation was relaxed five days before the citation in this cause; the proctors for Milligan did not deny these facts, but they alleged that a Consistory Court is held at Lincoln, and that in 1744 the bishop appointed a chancellor, and by his patent granted him all ecclesiastical jurisdiction throughout the diocese of Lincoln; the chancellor pronounced for his jurisdiction; Hillyer appealed; Milligan alleges a concurrency, and insists that it has been, and now is, the practice for a plaintiff to institute suits in either court at his option,

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November 12.

but all the instances they have produced are of persons cited to Godmanchester, in Huntingdonshire, and not to Lincoln ; they are to prove their jurisdiction, and to shew it is now the practice, and yet their last instance is 154 years ago.

Evidence for Milligan read.

The act of court of the 27th October, 1752 ; Jephson appeared for Hillyer under protestation, and alleged Dr. Bettesworth's patent, by which he has a grant of all ecclesiastical jurisdiction in Bucks, except as to granting institutions and licences to clerks, and alleged that the parties live in Bucks. Inhibition relaxed, the 24th August, 1752 ; Bradley, for Milligan, alleged that the chancellor of Lincoln for time immemorial has had jurisdiction throughout all the diocese.

Patent to Dr. Taylor in 1744, appointing him chancellor.

13th November, 1752. Act when the chancellor rejected Hillyer's protestation, and assigned him to appear simply.

Dr. Taylor's patent, dated the 9th May, 1744, gives him power to proceed in all ecclesiastical causes within the diocese and city of Lincoln ; to visit the diocese when the bishop is hindered ; to grant probates, &c., and licences for marriage throughout the diocese, and generally to exercise all species of ecclesiastical jurisdiction.

Extract from the Register of Lincoln.

1294. Bishop grants all sorts of ecclesiastical jurisdiction to the chancellor throughout the diocese.

B. A commission in 1293 to a commissary to

expedite causes at Huntingdon, in the absence of the chancellor.

D. 1342. A commission to a commissary to exercise jurisdiction as a sequestrator in the counties of Bucks, Bedford, and Northampton.

E. 1418. Like commission for Bucks and Oxon.

1598. A suit before the chancellor at Godmanchester, against Johnson, a beneficed clerk in Bucks, upon a question touching his institution ; cause appealed.

Same year, a cause of defamation commenced before the chancellor at Godmanchester, between two inhabitants of Bucks ; the defendant appeared. Nothing further appears of the cause.

1599. A testamentary cause commenced at Godmanchester, against an inhabitant of Bedfordshire.

1600. An inhabitant of Amersham, in Bucks, cited another inhabitant of the same before the chancellor at Godmanchester, in a cause of defamation ; the defendant did not appear, and nothing further appears of the cause.

Same year, suit against the parson of Hedsore, in Bucks upon his institution.

1610. Suit at Lincoln against a parson of Leicestershire. No appearance.

1616. At a court at Grantham, the same against a parson of Leicestershire *in causâ legati*. No appearance.

1665. Suit in the Consistory of Lincoln, by a clerk of Leicestershire against his parishioner for tithes.

1721. A cause of perturbation of seat at Lincoln, between two persons of Lincolnshire.

No commissaries of Lincoln or Stow.

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November 12.*Evidence read for Hillyer.**Dr. Bettsworth's and his predecessor's patents.*

6. Art. of Milligan's allegation. — There are six archdeaconries in the diocese of Lincoln; and it always has been, and now is, the practice, to have a concurrence of jurisdiction between the chancellor of Lincoln and the commissioners within those archdeaconries.

Dr. Paul, for Milligan. — Stat. 23 H. 8. c. 9. No person shall be cited out of his diocese, *ergo*, he may be cited within. Lindw. de Sequestrat. cap. Frequentes, vicar general can do all ecclesiastical acts but giving institutions; if a bishop has two commissioners, the dignior is to be preferred. Concurrences are lawful. Lord Cowper was of opinion, the judges in the diocese of Lincoln had concurrences. Godolp. Repert. Can. p. 81. Chancellor is not confined to any part of the diocese. Ridley's View says, chancellors are almost as old as bishops. Hostiensis de Offic. Vicar. No. 2. and No. 10. We confess both parties in this case live in Buckinghamshire; the question is, whether by law the chancellor has not a jurisdiction throughout the diocese. Chancellors older than commissioners, *Maud and Matthews*, B. R. a case often mentioned by Sir Nathaniel Lloyd. Lord Holt said, the words *constituo &c. cancellarium nostrum*, would give a man all the rights of a chancellor, and the law will find out what those rights are.

Dr. Simpson, same side. — It lies upon them to shew the commissary has an exclusive jurisdiction; there are no words in his patent to give it him; his patent is in derogation of the chancellor's;

but without express words he cannot take away the chancellor's right. A vicar must prove he is endowed of great tithes, because *de jure*, they belong to the rector, unless the jurisdictions are concurrent; the patents are void in law, because they are contradictory; there is an inherent jurisdiction in the bishop, and he and the chancellor are, in law, the same person; the bishop may give his inherent power to be executed as he pleases. No grant of a particular can derogate from the general jurisdiction; the instances we have read shew the chancellor has exercised jurisdiction in all the commissaryships.

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Dr. Smalbroke, same side. — This question relates not only to causes, but to granting probates, &c.; the true state of the question is, whether the commissary has a right exclusive of the chancellor? The exclusive right of a commissary has never been established on a contest. Consist. Lond. 1746, *Hardy and Lilly*, a man living in the commissaryship of St. Paul's, within the diocese of London, was cited in a cause of tithes before the chancellor of London. Objection made, that he ought to have been cited before the commissary. Dr. Andrew said, the bishop's general rights remained throughout the diocese, unless an exclusive right in the commissary had been shewn, and held the citation before him was good.

Dr. Pinfold, for Hillyer. — Godolphin speaks of the power of a chancellor where there are no commissaries. C. 1. Lib. 2. tit. Gloss. Commissaries are ancient, are mentioned in stat. 23 H. 8. There were Commissaries of Bucks long prior to stat. 1 Eliz. which restrained bishops from making new

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officers. The statute of Citations forbids citing out of peculiar jurisdictions.

Dr. Hay, same side.—I deny it to be law, that a commissary cannot have an exclusive jurisdiction without express words. In *Hardy and Lilly's* case, the commissary was appointed by the Dean and Chapter of St. Paul's, and not by the Bishop of London; and as the chapter's right to appoint a commissary was derived from the bishop by grant or composition, it cannot be presumed he meant to give away his whole jurisdiction to another without express words. There is no instance of a voluntary jurisdiction exercised by the chancellor of Lincoln. No instance of a concurrence before the stat. 23 H. 8. and therefore the chancellor cannot cite out of the commissaryship, because he is not the immediate judge. Coke's Select Cases, 6 Jac. *Porter and Rochester's* case, p. 4. all the judges of the Common Pleas held, that the Court of Arches could not cite persons originally out of the diocese of London, though the Arches Court sits in that diocese; and the judges said, the view of the statute was, to restrain citing persons out of the jurisdiction where they live. The present claim of the Chancellor has not been exercised for 154 years.

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I said, that though a bishop could not alter or limit the powers which the law gave to a chancellor, yet anciently before the restraining statutes, when bishops could create new officers, they might limit the exercise of the chancellor's authority to a part of the diocese, and might appoint commissaries to exercise the same jurisdiction in

other parts of the diocese ; that commissaries were ancient officers, and particularly that there had been a commissary of Buckinghamshire long before the restraining statute of 1 Eliz. ; that commissaries were instituted, not so much for the ease of the chancellors or vicars-general, as for the benefit of the subject, that justice might be done them near home, particularly in this diocese ; it would be a very great burthen on the inhabitants of Buckinghamshire if they should be obliged to attend at Lincoln, when justice could be administered to them in their own county ; that concurrences produced many inconveniences and ought not to be established without clear evidence ; that, though the chancellor's patent gave him jurisdiction in all the ecclesiastical causes throughout the diocese, and the commissary's patent gave him the same jurisdiction in the county of Buckingham, yet they were not contradictory, or necessarily implied a concurrency, for supposing the office of commissary was vacant, the chancellor would clearly, during that time, have a jurisdiction in Buckinghamshire by virtue of his patent ; it was necessary therefore to shew that by practice and constant usage, the chancellor had always, down to the present time, exercised a concurrent jurisdiction with the commissary, and Milligan had accordingly taken upon him to prove that fact, and had produced many instances in order to prove it, but I thought had not proved it ; those instances which were brought from other commissaryships in the diocese of Lincoln, I thought were totally immaterial, for it did not appear to me that the patents of those commissaries, and the patent of the commissary of Buckinghamshire were the

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same, and if they were, there might be a different usage in one commissaryship from what there has been in another, and therefore the only instances that could be regarded, were such as were brought from the county of Buckingham, and of those, such as were against clergymen with respect to their institutions were immaterial, because institutions, and all matters relating to them, are excepted out of the patent of the commissary of Buckinghamshire, consequently there were only two instances that properly came under consideration; first, the instance of 1598, when a citation was returned in a cause of defamation, at the suit of one inhabitant of the county of Buckinghamshire, against another inhabitant of that county, and the defendant appeared without protestation; but as it did not appear that the cause proceeded any further, and was finally determined by the chancellor, I thought little stress could be laid on it; it might fairly be presumed that the cause was dropped for want of jurisdiction. The second instance was in 1600, when an inhabitant of Anersham, in Buckinghamshire, cited another inhabitant of the same place, before the Chancellor of Lincoln, at Godmanchester, in a cause of defamation; the defendant did not appear; and it does not appear that he was proceeded against for contumacy, or that any thing more was done in that cause, and therefore that instance rather shews a want of jurisdiction in the chancellor than establishes his right; and from that time to this, which is 154 years ago, it is not pretended that the chancellor has ever attempted in any way to exercise a concurrent jurisdiction with the commissary of Buckinghamshire; I therefore pro-

nounced for the appeal, reversed the chancellor's decree, ordering Hillyer to appear simply ; dismissed him from the citation to appear before the chancellor of Lincoln, and condemned Milligan in 60*l.* costs.

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PREROGATIVE COURT OF CANTERBURY.

DYER *against* CALWELL.

November 14.

William Calwell, deceased, died 14th July 1751 ; made a will which is not disputed, and appointed two executors, who have renounced. On 9th May 1752, administration *cum testamento* was granted to Ann Calwell, deceased's widow. In January 1753, William Dyer pretended that the deceased had, in consideration of love and affection to him, given him a bond for 200*l.* to be paid six months after his decease, of which he demanded payment ; and at the same time produced a codicil, by which the deceased had left him a legacy of 200*l.* Dyer cited the widow to take administration with this codicil ; she opposed it, and he propounded it. She pleaded that the codicil was a fraud ; and also pleaded that the said Dyer had fraudulently procured a bond from deceased for the same sum, &c. He in his answers, acknowledged that he had the said bond in his custody ; whereupon *Dr. Hay*, the widow's counsel, moved that the Court would assign Dyer to bring and lodge in the Registry the

An application
to assign a party
propounding a
codicil, to bring
in a bond, which
had been frau-
dulently pro-
cured, and lodge
it in the registry
of the Court, re-
jected.

PREROGATIVE COURT. said bond, on suggestion that a fraud might appear upon inspection on the face of the bond.

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JUDGMENT—SIR GEORGE LEE.

But I was of opinion I had no jurisdiction to order the bond to be brought in; Dyer had not pleaded it: I could not oblige a person to produce evidence against himself, upon suggestion that he had such evidence in his custody; that the bond not being testamentary, I had no authority over it, and therefore rejected the petition.

ARCHES COURT OF CANTERBURY.

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November 21.

REES *against* HARRIS.

Appeal from St. David's.

The parson has
a right to carry
his tithes by the
usual way.

John Harris, vicar of Estmeal, in the diocese of St. David's, brought a suit against Richard Rees, upon the statute of Edward 6. (a) for subtraction of tithes, and hindering the vicar from carrying them away; whereby they were lost. The vicar was endowed of one third part of the tithes of grain arising in his parish. Rees, in 1751, occupied a farm called Broadley, and had thereon wheat, barley, and oats, the tithes of which, by valuation, were worth 2*l.* 5*s.* and the vicar's third part, therefore, was worth fifteen shillings. It appeared that Rees had duly set out the tithe, but would not suffer the vicar's agent to carry them off the

(a) 2 & 3 Ed. 6. c. 13.

ground, by the usual and accustomed way; but would have them carried through a gap in the hedges of the field where the way was steep and dangerous for a cart. The vicar would not carry them that way, and Rees would not let him carry them the usual way, whereby the tithe was lost to the vicar. The judge below decreed Rees to pay to the vicar fifteen shillings, the single value of the tithe, with costs.

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Rees appealed from that sentence to the Arches.

Dr. Hay, Rees' counsel, insisted that it was not necessary, within the statute of Edward 6. that the vicar should be allowed the usual way to carry off his tithe; it was sufficient if he had a way: that Harris might have carried them through the gap where Rees' car did go with one load of corn; and that this suit was frivolous and vexatious.

JUDGMENT — SIR GEORGE LEE. (a)

I was of opinion the parson has a right to carry his tithe the usual way, and the parishioner is not to allot him what way he thinks proper, without the parson's consent: that in this case, it appeared clearly that the value of the vicar's tithe was fifteen shillings, and that he was prevented receiving them by the obstinacy of Rees. I therefore confirmed the sentence, remitted the cause, and condemned Rees in 13*l.* costs.

(a) *Stephens v. Webb*, Vol. I. p. 261; *Burnell v. Jerkins*, 2 *Phill.* 391.

PREROGATIVE COURT OF CANTERBURY.

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November 23.

WHITE *against* WHITE.*On admission of an allegation.*

An allegation
admitted to
proof, because
the objection to
it, arose on a
point of law.

Dr. Paul for Thomas White. — John White died 1st April 1749, left Martha his widow, Thomas his brother, Sarah Lloyd his niece, and several other nephews and nieces, made a will, executed and attested by three witnesses, dated 27th March 1747, appointed his brother Thomas sole executor, and gave many legacies, but did not dispose of the residue. Deceased's two sisters died after making said will of 27th March, which is marked A ; whereupon it was suggested that deceased, with his own hand, wrote the unexecuted will marked B, dated 10th February 1748-9. In that will he also appointed his brother Thomas sole executor, and disposed of the residue. Both wills contain real as well as personal estate. The executor took probate of the first executed will ; afterwards the unexecuted will being found, the executor cited the widow, and all the legatees, to shew cause why the probate of the first will should not be revoked, and declared void, and why probate should not be granted to him of the latter unexecuted will. The deceased's widow and Sarah Lloyd, the niece, appeared and opposed the last will ; the executor gave in this allegation to propound it, the admission of which was opposed in general on a point of law, viz. It was insisted that the latter will, containing both real and personal estate, and being unexecuted, and having

been wrote two months before the deceased's death, could not by law revoke the former executed uncancelled will, and consequently, that the allegation pleading it was irrelevant, and ought to be rejected, because it was to no purpose to admit the allegation, when, if all the facts in it were proved, the will it propounds cannot be established.

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Dr. Simpson, for *Martha White*, the widow of deceased. — Executed will marked A. is dated the 27th March, 1747; the unexecuted will marked B. is dated the 10th February, 1748-9; the unexecuted will contains real as well as personal estate; he lived two months after the date of the will B.; it is incomplete, and not signed by deceased. (*N. B.* Deceased's name was inserted at the top); it charges his real estates, but it cannot operate as to them; not carrying it into execution is a departure from it. He kept the first will in his custody uncancelled. No circumstances or declarations in favour of the last paper are pleaded.

Dr. Bettesworth, for *Sarah Lloyd*, the niece.— Some of the legatees who are benefited by the real estate will lose their whole legacies, because the will B. is not executed.

Dr. Paul, for the Executor.—Residue is given to the executor by the last will. 16th June, 1724 in *Purefoy v. Purefoy*, a will made in 1696 was not executed; the testator declared he would alter his will, and was about doing it; set aside, because prepared for execution. *Hyde and Mason*(a) against *Calamy and Limbrey*, Deleg. 1732, the Court held that a signature which shewed the testator intended

(a) See Vol. I. p. 423. notes.

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to execute his will, should be considered (a) as a condition that it should not operate unless it was executed. *Coombe and Coombe* (b) Delcg. 1738, the same determination.—To this will there is no signature.

Dr. Hay, same side.—This Court has nothing to do with real estate; before statute of frauds the will B. would have been a good will for real estate; that statute has made some alterations with respect to wills for real estates; but in this case, the first will is not revoked so far as relates to the real estate, the real estate is well given by the first will, and must pass; the revocation is as to the personal estate only.

Dr. Harris, same side.—Will B. is a legal will, and if it stood alone would be pronounced for. Cases in Equity abridged, fol. 409, *Hyde and Mason*.

JUDGMENT — SIR GEORGE LEE.

I admitted the allegation, because the sole objection to it arose from a question of law, which could not be fully debated on the admission of an allegation.

November 23.

L'HUILLE against WOOD.

**Effect given to
a will which the
testator had
been prevented
from executing
by duress.**

Dr. Hay, for Benjamin L'Huille, the executor.—Hester Pascall, widow, died the 27th March, 1749; on the 21st March, 1748-9, she gave in-

(a) The presumption of law is against any testamentary paper which, upon the face of it, purports to have been intended to be more complete than it actually is; that presumption, however, may be repelled by circumstances. *Read v. Philips*, 2 Phill. 122; *Harris v. Bedford*, 2 Phill. 177; *Thomas v. Wall*, 3 Phill. 23; *Buckle v. Buckle*, 3 Phill. 323; *Forbes v. Gordon*, 3 Phill. 628.

(b) Mod. 759; *Moore's Rep.* 759; 8 Vin. Abr. 43, 22; 1 Hagg. 122; Vol. I. pp. 380, 426.

structions to Charles Shearer, an attorney's clerk, in presence of Mary Lowe and William L'Huille, her nephew, for making her will ; he minuted them down in writing, and read them to deceased, and she approved them ; the next day, the 22d March, Shearer and William L'Huille went to her again, and carried a will drawn from those instructions, in which will the deceased's brother-in-law is appointed sole executor ; the deceased's daughter, Mary Wood was then with her ; Wood said deceased should not make a will ; Shearer read the will to deceased, she approved it, and said she was willing to execute it ; the daughter sent for Richard Wood, her husband, when he came he would not suffer the deceased to sign it ; the deceased declared she was desirous to sign it, but the Woods prevented her ; thereupon, Shearer and L'Huille went away ; L'Huille went again in the evening, and was denied admittance ; question is, whether the deceased was not in the custody of the Woods, and was hindered by them from making the will ? The apothecary says, the deceased told him, she had thoughts of making a will, but was glad she was prevented.

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Dr. Simpson, for Wood.—On deceased's death, Mary Wood, her daughter, took administration to her, as dying intestate ; about two years after she died, and her husband Richard Wood took administration to his wife, and administration *de bonis non* to deceased ; Richard is since dead, and his brother James, the now party in the cause, took administration, &c. Soon after the death of his wife, L'Huille cited Richard Wood to bring in the administration to the deceased, and to shew cause why it should not be revoked and probate granted

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to Benjamin L'Huille, the executor of the deceased's will ; pending the suit in 1753, he died ; then James Wood, his administrator was cited into the cause, who is a stranger to the whole transaction, and has therefore examined only Mather, the deceased's apothecary. Lowe, a witness for L'Huille, swears the will was not read to the deceased ; the deceased was sensible during all the transaction, and was not in custody of the Woods.

Witnesses for L'Huille.

1. William L'Huille.—Sometime before the 20th March, 1749, deponent, who was nephew to the deceased, at her desire bought an East India bond for her ; the deponent carried it to her, and she said she would give it to deponent ; deponent said she could not give it to him but by will, and asked her if she desired to make her will ; she said it was her desire, and bid deponent bring somebody to take instructions ; on the 21st March, deponent carried Shearer to her, and told her he had brought a person to make her will ; the deceased then gave Shearer instructions in the presence of deponent, and of Mary Lowe, the deceased's servant ; he took them in writing, read them to deceased, and she approved of them ; Shearer then carried them away with him to draw a will ; on the 22d March, deponent and Shearer went to deceased with the said will ; the deceased was in bed, and her daughter Mary Wood and Lowe were in the room with her ; Wood asked what Shearer did there, he answered he had brought the deceased's will for her to sign ; Wood answered, her mother should not make or sign any will ; but she desired to hear it read ; Shearer then read the will audibly to deceased, and asked her if she liked it, she replied,

it was to her mind ; soon after, Richard Wood came in ; Shearer proposed to deceased to sign it, she answered, " I am willing to sign it, and it is my desire to do so, but my daughter will not let me ;" and Richard Wood then said, she should make no will, and he would not suffer the deceased to sign it, and said to Shearer, he might go about his business ; Shearer and deponent then went away ; deceased was of sound mind, &c. ; about six, that evening, deponent went to deceased's lodgings, but was refused admittance to her by Richard Wood, who threatened to charge a constable with deponent ; deponent met Shearer going to deceased with the will, but on deponent's telling him in what manner he was refused admittance, Shearer turned back,

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2. Charles Shearer.— On the 21st March, deponent went with William L'Huille to deceased, she owned to deponent she desired to have a person come to her to make her will — deposes the same as L'Huille to the instructions, &c., and that Lowe was present ; the deceased desired deponent to ask Benjamin L'Huille if he would be her executor, he said " Yes ;" 22d March, deponent and William L'Huille went to deceased, and carried the will with them ; they found Mary Wood and Lowe with her ; deceased asked deponent if her brother would be executor ? deponent told her he would ; Wood opposed deceased's executing it, and sent for her husband ; he came, and said the deceased should execute no will ; deponent asked deceased if she would sign it, deceased answered, " I am willing to sign it, but my son and daughter say I shall not, but it is my desire so to do," and Richard Wood would not suffer pen and ink to be brought ; deponent and L'Huille went away with the will ;

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at six in the evening, deponent was going to deceased with the will, but met William L'Huille, who told him he was refused admittance, and thereupon deponent turned back.

3. Ann Hall.—Deceased lodged at deponent's house; one day, William L'Huille came to deceased, and she seemed overjoyed at seeing him, and then said to him, she had always promised to do something for him, and she would do it, and leave him something; deponent then left the room; says she had orders from Richard Wood not to let anybody see deceased. Richard Wood turned William L'Huille out of deceased's room, and threatened him with a constable.

4. Mary Lowe.—Deponent was servant to the deceased; William L'Huille came four times in a week to deceased; deponent was present at all the times, and never heard the deceased bid him bring a person to make her will; the second time he came he brought Shearer with him, who took an account in writing of some East India Bonds of deceased's, which deponent by deceased's orders delivered to him to take account of them; Shearer did not then read anything to deceased; next day Shearer and William L'Huille came again, and then Shearer read to deceased some thing about giving 100L to William L'Huille, and about other legacies, and making Benjamin L'Huille executor; the deceased made no reply; Mary Wood then coming into the room, William L'Huille said to Shearer, "We must go now and come another time;" the next day, L'Huille and Shearer came again to deceased's lodgings, where deponent and Mary Wood were, and on their coming in, Wood sent for her husband; deponent told deceased that William L'Huille and the lawyer were come, de-

ceased replied, "I have signed nothing, nor I have done nothing, nor nothing I will do; I never have made, nor did, nor ever will make a will, for what I have is my daughter's, and no one's else :" Richard Wood told them they might go about their business, but they refused to go; Wood opened the door and told them deceased should not be disturbed; deceased same day ordered deponent to tell Mrs. Hall and her husband not to let any of the L'Huilles come to her; deponent gave such orders, and William L'Huille was thereupon refused to see her; deponent said to deceased, if they could persuade her to make a will, they wanted to get 500l. of her; deceased replied, "I have made no will, and will make none, for what I have is my daughter's;" deponent was present all the time; L'Huille and Shearer were with the deceased, and she never heard her give any instructions for a will, or heard any read, or heard her say she was willing to sign, &c.; the Woods did not say deceased should not make or sign a will, or hinder her from signing it; deponent has several times heard Mary Wood ask deceased to make a will, and she refused, and said she never would make one; did not hear Shearer read any thing to her, except as aforesaid.

3. Int. Shearer wrote an account of East India Bonds. 4. Int. The will was not read to deceased in deponent's presence. 5. Int. Often heard deceased say she would make no will, and ordered Wood not to suffer L'Huille to come to her. 6. Int. L'Huille was refused admittance by deceased's orders. 7. Int. Deceased told her apothecary she had made no will, for why should she leave any thing from her daughter? she declared thus to Mather two days before she died.

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Will read.

Witness for Wood.

Isaac Mather, apothecary.—The deponent knew deceased for twenty years, and was apothecary to her to her death; she left Mary Wood, her only child; a few days before her death deponent spoke to her about her will, as he heard she had been about making one; the deponent spoke freely to her about it; deceased replied thus, “I had thoughts of making my will, but now I will not;” and after such discourse, Richard Wood and his wife came in, and one of them asked her if they should order young L’Huille not to be admitted to her, she said “Yes.”

Dr. Hay, for L’Huille. — Not propounding the will sooner is no objection; a will may be propounded at any time; the transaction was not clandestine but open; Lowe was present at each time. L’Huille and Shearer, against whose evidence there is no objection, prove an *animus testandi*, instructions, reading over to, and approbation of the will, and that she would have executed it if she had not been forcibly prevented by the Woods. Where a testator is prevented by force, the law considers the will as executed, and then her subsequent declaration to Mather could not destroy it.

Dr. Bettesworth, same side. — When a testator is hindered by a person interested, the will, though not executed, is good.

Dr. Simpson, contrà, for Wood.—If the daughter had been living when the cause began, she could have instructed it better than James Wood can,

who is a stranger to the whole transaction. William L'Huille is son to the executor, and Shearer is a clerk not out of his time. The motion for making a will came from one of the legatees to the deceased; she expressed no impatience to execute the will, or uneasiness at being prevented; there appears to be no force, but only persuasion by her daughter not to sign it; she put off the execution out of love to her child; she might have executed it afterwards if she would, for she lived some days after, and therefore her not doing it, is to be deemed a departure from the will; and it appears she had departed from her intention by her declaration to Mather.

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Dr. Pinfold, same side.—Administration subsisted four years before the will was set up, and probably the debts have been paid and the estate distributed. Deceased during the whole transaction was in her senses, and expressed no indignation at her daughter or her husband for the pretended force.

JUDGMENT — SIR GEORGE LEE.

I was of opinion deceased's intention to make a will, her giving instructions for one, the will being read to, and approved by her, and her desire to execute it, if she had been suffered by the Woods to do so, were fully proved by William L'Huille and Shearer, against whose testimony, (especially the last) there was no legal objection; and they were strongly supported by some, who in the main had given a very strange and incredible evidence, but they admitted that the deceased ordered her bonds to be delivered to Shearer to take an account of them, and as Shearer was a stranger to

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her, that order could be only with a view to making her will ; she admits likewise that Shearer read to the deceased a paper, in which there were legacies, and Benjamin L'Huille was executor, and she mentioned to deceased how much she had given to the L'Huilles, which she could only know by hearing the will read, and she says also that Richard Wood turned William L'Huille and Shearer out of the room, for which she does not pretend deceased gave any orders ; this confirms their evidence as to forcibly hindering deceased from executing it, and Shearer also says, that Richard Wood would not suffer a pen and ink to be brought into the room, and both she and Hall prove that the Woods would not suffer L'Huille to come to deceased afterwards ; it is therefore plain that the deceased would have executed the paper propounded, if the Woods would have suffered her, who were to receive benefit by her not making a will ; — under those circumstances I was clearly of opinion, the law did consider the will as executed, and then the subsequent declaration to Mather (who seemed to me to be set on to dissuade the deceased from signing her will) could have no effect to destroy a written will, and as to what had been said, that she might have executed the will afterwards if she had pleased, I thought it had no weight, for deceased was plainly in the custody of the Woods, from the 22d of March to her death ; I therefore pronounced for the validity of the will, revoked the administration, and swore Benjamin L'Huille the executor, but at the desire of Wood's proctor, ordered the probate not to pass under seal till after fifteen days.

ARCHES COURT OF CANTERBURY.

GLEN *against* WEBSTER and WILSON.Michaelmas
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December 2.

Dr. Hay, for James Webster and James Wilson, executors of David Glen.—David Glen made his will, appointed his wife, Mary Glen, his nephew, James Webster, and James Wilson, executors, gave the residue to his wife, Mary Glen, and James Webster. On 9th February 1749, all the three executors proved the will. Mary Glen has now cited her two co-executors in a cause of legacy for her moiety of the residue. Smith appeared as proctor for the two executors under protest, that she could not by law sue her executors in this Court in a cause of legacy. Joint executors are in law one and the same person; an act done by one of them is the act of all. Nelson, tit. Co-executors. One executor cannot sue the other relating to the will, except in a legacy of the residue, in which case an action of trespass may be brought at law. Glen being possessed of a probate, must seek her remedy at law. Common legatees, that are not executors, have nothing to do with the assets.

An executor has a remedy against his co-executor, and in the Court of Arches may, in the capacity of residuary legatee, maintain a suit for his share of the residue.

Dr. Pinfold, for Mary Glen.—Glen has had no accounts of the residue. One executor may call another to an inventory. Glen has two capacities, executor and legatee. She has cited the executors as legatee. A man may renounce as executor and take administration as residuary legatee.

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JUDGMENT—SIR GEORGE LEE.

I was of opinion that the authority from Nelson only shewed what remedy a co-executor might have for a legacy at law, but did not exclude a remedy in the Spiritual Court; that in many cases an executor might have a remedy against his co-executor at law; and I was of opinion in this case that Glen, in the capacity of residuary legatee, might cite and maintain a suit in the Arches for her share of the residue. I therefore rejected Smith's protest, and decreed the executors to appear to the citation.

PREROGATIVE COURT OF CANTERBURY.

December 4.

CHAPMAN *against* GUY.

After sentence the Court rejected an application on behalf of the party who had established a will, offered for the purpose of shewing the *mala fides* of his opponent, with the view to a condemnation in costs.

John Chapman died 27th October 1753; left his widow, Mary Chapman, and a daughter Mary Guy; made his will, dated 26th October 1753; appointed his wife executrix and universal legatee. Mary Guy, as daughter, put the executrix upon proving it by witnesses. The executrix propounded it, gave in a common condit, and examined the three subscribing witnesses, who proved execution and capacity, but did not prove instructions or reading the will to deceased. Guy administered interrogatories to Chapman's witnesses, but did not plead or oppose a sentence being given for the will.

I gave sentence for the will; and then the counsel for Chapman moved that they might be at

liberty to read affidavits to prove that Guy knew PREROGATIVE COURT. deceased was in his senses, and that she approved the will after his death, and therefore was *in mala fide* in opposing the will, and putting the executrix to costs, in order to have Guy condemned in costs; or if affidavits were not proper evidence, to allow them to plead the facts contained in the affidavits in an allegation; and *Dr. Paul*, for Chapman, cited this case, *Prerog. Dec. 13. 1727, Cranwell against Edwards*: John Shilling made his will in the East Indies, and appointed John Cranwell his executor, Edwards, the deceased's sister and next of kin, had certain information of this will, but she nevertheless took administration to him as dying intestate: the Court condemned her in costs.

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December 4.

JUDGMENT—SIR GEORGE LEE.

I said I thought the Court had done very right in that cause, for the sister was clearly guilty of a *mala fides*; but in this case Guy had only done what she had a right to do as next of kin; that this attempt was entirely new; she, the executrix, might have pleaded Guy's knowledge of deceased's capacity, and her approbation of the will in the cause, instead of giving in a common conditit; but as she had neglected that opportunity, she could not now plead after sentence, or exhibit the affidavits, for that would be grafting a new cause upon the first, and would make suits endless; that the ground for giving costs must be taken from what appeared in the cause itself, and must not arise from matter subsequent; that here Guy had done no more than what, by constant practice, she had a right to do, without paying costs, as being entitled to distribution under an intestacy; and though in this case the Court had given sentence for the will,

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yet the evidence was as slight as could be in any case, the testator being on his deathbed, and nothing being proved but a bare execution and a general capacity. I therefore rejected Chapman's petition, and refused to condemn Guy in costs; and then Guy's counsel moved that Chapman might be condemned in the costs of the day, she having given in many affidavits which Guy had been forced to answer, but I refused to give costs on either side.

ARCHES COURT OF CANTERBURY.

By Day after
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December 9.
The declarations
and affidavit of
a deceased per-
son, relating to
matters in which
he was himself
concerned, ad-
mitted to proof.

ROBINS *against* SIR WILLIAM WOLSELEY.

Sir William Wolsey, in the Consistory of Litchfield, sued Ann Robins, alias Lady Wolsey, for a divorce for adultery as his wife. She pleaded in bar that she was the wife of John Robins, Esq. and was married to him on 16th June 1752, whereas Sir William did not pretend he was married to her till 23d of September 1752. The judge below ordered the proofs upon Sir William's libel, and her plea in bar to proceed *pari passu*; Robins appealed, and I was of opinion that the question upon the matter in bar ought first to be determined, and retained the cause. Robins' proctor repeated her allegation, in which the chief proof of her marriage appeared to be an entry thereof in the parish register of Castle on 16th June 1752. Sir William gave in an allegation, pleading that said entry was false, that the marriage was first entered on

the 9th of June upon a rasure, and afterwards was altered to the 16th of June, and that, in fact, they were married at a private house on 9th October 1752. This allegation was greatly to be supported by the declarations, and an affidavit of Mr. Corn, the vicar of Castle, who married them, and made the entry, and is since dead. The counsel for Robins, who opposed the allegation, insisted that his declarations and affidavit could not be received, and, consequently, that so much of the allegation as depended on them, ought to be rejected.

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COURT.

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December 9.

JUDGMENT — SIR GEORGE LEE.

But I was of opinion that the declarations and affidavit of a witness who was dead, relating to matters in question, in which he was concerned, ought to be received in proof; and it would be a future consideration what weight was to be laid thereon. I therefore admitted the allegation.

N. B. Mr. Adderley, proctor for Mrs. Robins, protested of appealing.

PREROGATIVE COURT OF CANTERBURY.

PLUNKETT, formerly SHARP, *against* SHARP and DAY, Executors of SHARP.

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Dr. Collier, for Mrs. Ann Plunkett, formerly Sharp.—Thomas Sharp, the deceased, left Ann, now Plunkett, his widow, and William Sharp, his

A marriage at
the Fleet suffi-
ciently estab-
lished to entitle
the asserted wi-
dow to the ad-
ministration of her husband's effects.

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brother ; the deceased died the 23rd November, 1751 ; the brother acknowledged her as deceased's wife. Administration to deceased, who died intestate was granted to her father John Banks, as her guardian, she being a minor. William Sharp made her several payments as widow, from deceased's death till April, 1752, and at the head of his account he called her Mrs. Ann Sharp ; he made no opposition to granting the administration ; William recommended to her an appraiser to make an inventory ; Banks, as administrator, frequently called on him to come to an account, but he put it off. In August, 1753, Mrs. Plunkett came to age, and she was at that time married to Christopher Plunkett, she then applied for administration to her first husband in her own right, caveat was entered in name of John Thomas, warned, 4th September, 1753 ; she prayed administration. William Sharp appeared, and first sess. Michaelmas, 1753, denied her interest ; she confessed his, and propounded her interest ; William pleaded in contradiction, and has examined four witnesses : William is now dead, but his executors are made parties. Plunkett has examined twenty-one witnesses, who prove that the deceased courted her in March, 1747, when she was between 14 and 15 years old, and he was about 19, and an apprentice to his brother William ; she lived with her father Mr. John Banks, who kept an ale-house near Moor-fields, in the neighbourhood of William Sharp's house ; the courtship continued till October 1747 ; William knew of it, and used to send his servant on nights to fetch him home ; in said October, she asked her father's consent to marry deceased privately ; he consented to the marriage, but insisted she should live on with him till she was 17 years

old ; 13th October, 1747, she acquainted her father and mother that she and deceased were to be married that day at the Fleet ; in the afternoon they met at her dancing-master's house, and went to the Fleet, and were married there. We have one witness, Thomas Anderton, to the fact of the marriage, who was examined the 14th January, 1754, and was then aged 21 ; he proves that producent and one Thomas Sharp, in October, 1747, were married in the Fleet, at Bates's coffee-house, by parson Dare, and that the witness Mrs. Bates, and one Foxall were present at the marriage, all of whom but deponent are dead ; they were married by the name of Thomas Sharp and Ann Banks ; he swears to the identity of Ann ; says he called a coach for them after they were married ; deceased gave Dare three guineas for marrying, but Dare insisted on half-a-guinea more for a certificate ; deceased had not money enough, and therefore left his watch in pawn with Mrs. Bates for the half guinea, which as she said, he afterwards redeemed. On the same night, about eight, she came home, shewed her father and mother a ring, and said she had been married at the Fleet ; the deceased came and supped at her father's that night, and did so most nights for five or six months, but lay at home ; he then told her father he was going to Bristol for a fortnight or three weeks ; two or three days after, she went away privately, but wrote a letter to her father to tell him she was in London with her husband ; during their absence, he was under a salivation, and his wife attended him, at a lodging in Colman-street ; at first he went there by the name of Clark, but afterwards he owned his name was Sharp, and told Eugo, his nurse, that he was married to Nan-

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ny Banks, and sent her for his wife to come to him ; she immediately came, and deceased then owned her for his wife in presence of the said nurse, and his surgeon ; the deceased told Dickenson, his surgeon, that she was his wife, but desired he would keep it secret ; his brother William and his wife visited deceased, and Ann was introduced to them, and they treated her as his wife ; deceased owned his marriage to her father and mother ; they lodged together publicly at a lodging in Moorfields, were visited and owned by the relations on both sides ; she went by the name of Sharp ; was at William's house at Walthamstow, and was owned there as deceased's wife ; Ann miscarried, and William's wife came to her, and brought her own midwife to attend her ; deceased and Ann, together with an aunt of deceased, were godfather and godmothers to a child of William's ; deceased and Ann lay together at William's house in Walthamstow, by the appointment of William and his wife ; at all their lodgings she was visited and owned by William and his wife. On deceased's death, William and his wife behaved to her very kindly as a sister ; she then went and lived with her father, and they visited her there ; deceased and Ann sometimes quarrelled ; their own witnesses prove William's owning of Ann as deceased's wife, and that there was a public reputation of their being man and wife ; their witnesses attack Ann's character. The principal point will be costs.

Dr. Simpson, for the Executors of William Sharp.—Deceased's father, by his will, made William Sharp his executor, and left two-thirds of his estate to his son William, and the other third to be paid

to his son Thomas at his age of 22; William is dead, his executors are just come into the cause, and are not liable to costs; Ann's behaviour was very bad, such as removes any presumption arising from cohabitation: shall insist they have not proved the fact of marriage.

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Witnesses for Ann Plunkett.

1. John Banks. — Producent is deponent's daughter; deceased courted her when she was between 14 and 15 years old; she was virtuously educated; deceased was then 17 or 18 years old, and lived with his brother William; deceased publicly courted producent with his brother's knowledge, who used to send his servant to deponent's house at night for deceased; producent received his courtship with deponent's consent, but deponent advised her not to marry till she was 17; deceased pressed producent, as she said, to be married privately and unknown to deponent at the Fleet; deponent consented to their being privately married there, and she was to live with deponent till she was 17. On the 13th October, 1747, producent told deponent she was to be married that day at the Fleet; she went out, and when she returned, said she had been married at the Fleet; the deceased supped that night at deponent's house, and then went home; he continued to visit her every day for five or six months, and then said he was going to Bristol for a fortnight; three or four days after, producent went away privately, but by letter informed deponent she was with her husband in London; about five or six weeks afterwards, deceased came to deponent and owned to him his marriage with producent; from that time, they lived publicly together as man and wife, and

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his brother William and his wife owned them as such ; publicly lived as man and wife at all their lodgings, and were owned as such by William and his wife, and they used to carry her in their coach to William's house at Walthamstow ; after deceased's death, they visited producent as deceased's widow, and owned her as such, and shewed great regard to her ; William recommended an appraiser to her to value deceased's goods, and make an inventory. Administration was granted to deponent as guardian to Ann ; William paid deponent money as administrator for the use of Ann.

3. Int. Has heard producent was married at May Fair to Plunkett.

2. Ann Banks. — Deponent is mother to producent ; agrees exactly with the former witness ; proves owning by deceased's brother, and his wife before and after deceased's death.

3. Jane Eugo.—Deponent was sent by Wheeler, a surgeon, to attend deceased as a nurse in his salivation ; he went when deponent first came to him by the name of Clark, but after lodging in Colman Street two nights, he told deponent who he was, and said he was married to Nanny Banks, and sent deponent for her to come to him ; producent came ; deceased received her with the greatest joy, and owned her as his wife to deponent and the surgeons ; and they treated each other as husband and wife ; William and his wife came to see him, and they owned Ann as his wife.

4. Keziah Allen. — Deponent is cousin to producent ; proves courtship in 1747 ; deponent was married on 12th October, and producent was at her wedding dinner ; proves general reputation, that deceased and producent were man and wife ;

says deceased owned his marriage to deponent; William and his wife visited and owned her as their sister; they visited producent the night deceased was buried, and they carried her to their house in the country.

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5. Sarah Wise. — Deponent was servant to deceased and producent; proves general reputation, and owning by each other and by deceased's relations, and that William and his wife carried producent in their coach; producent and deceased were sponsors to a child of William's with their aunt Mrs. Webb.

2. Int. Deceased was apprentice to his brother William; and often lay with producent in the evening, and afterwards went home to his brother's.

4. Int. Gives producent a good character.

6. George Waugh. — Deponent was barber to deceased and his father; proves cohabitation with reputation, and William's owning of producent.

7. Henry Dickinson. — Deponent was surgeon to deceased; in 1748, when he was salivated, swears that deceased told him producent was his wife; deceased said he had been married five or six weeks, and desired deponent to keep it secret; producent went by name of Sharp.

8. Rebecca Gering. — Deponent was great-aunt to deceased; she esteemed producent to be deceased's wife; proves William and his wife's owning her; and that producent was godmother to William's child, as wife to his brother.

9. Mary Webb. — Deponent was aunt to deceased; fully proves cohabitation and owning by William; and that producent and deponent were godmothers to William's child; deponent always esteemed producent to be deceased's wife; William owned her after deceased's death as his sister.

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10. Mary Lawley. — Proves cohabitation with reputation, and William's owning producent as deceased's wife.

11. Samuel Stokes. — Proves reputation of courtship and cohabitation, and owning particularly by William.

2. Int. Producent has not an ill character.
3. Int. Producent and deceased often quarrelled, but he spoke of her as his wife.

12. Thomas Anderton, æt. 21. — Deponent is apprentice to Bates, a bricklayer; in October 1747, Thomas Sharp and producent, by name of Ann Banks, came to the Fleet; Dare, a reputed parson, and Foxall, were standing at deponent's master's door, who kept a coffee house; they asked him if they wanted a clergyman, they said, "Yes," and accordingly came into the house, and were carried into a room upstairs; deponent and his mistress, Elizabeth Bates, and Foxall were present, and saw Dare marry them; all the said witnesses and the parson are dead; Thomas Sharp seemed to be about thirty years old, but producent seemed to be very young; deponent never saw Thomas Sharp but that time, but has since seen producent and knows she is the same person he so saw married to one Thomas Sharp; deponent was told said Thomas paid Dare three guineas for marrying them; deponent afterwards called a coach for them, and Sharp gave him six-pence; deponent was present out of curiosity; Mrs. Bates, since dead, told deponent that Thomas pawned his watch to her for half-a-guinea to pay for a certificate, and afterwards came and redeemed it.

3. Int. Deponent has never seen producent but once since said marriage, and that was lately.

4. Int. Never saw deceased but at the time of said marriage.

13. Mary Williams. — Deponent was servant to deceased and producent; proves cohabitation as man and wife, and owning by William and his wife, and producent being at William's house at Walthamstow by invitation; deponent esteemed them to be man and wife.

14. John Cox. — Deponent appraised deceased's goods, and William desired deponent to give the turn of the scale to producent; deponent apprehended producent was deceased's widow.

15. Edward Myre. — Deponent was groom to deceased's father, and afterwards to his son, William; proves deceased kept company with, and was reputed to court, producent, who had a good character; says deceased owned his marriage to deponent, and he used to call producent wife; William and his wife, and producent, used to go into the country together in William's coach.

16. John Carter. — Deponent was servant to John Banks; proves courtship; says he once heard deceased ask producent to marry him; gives producent a good character; says deceased and producent cohabited together as man and wife.

17. Elizabeth Jenner. — Proves reputation of courtship, and of producent being deceased's wife.

3. Int. Has heard producent's mother say, producent was married at St. Paul's; but before deponent thought producent had been debauched by deceased.

18. William Mead. — Proves exhibit C; but says the name, William Sharp, is a little unlike said William's hand.

19. Mary Barnard. — Deponent attended producent on her miscarriage at the desire of William's

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wife, who bid deponent go to Mrs. Sharp; deponent is midwife to William's wife; deponent esteemed producent to be deceased's wife.

20.. Mary Siggs. — Proves that producent was often at William's house; and once producent and deceased were there together, and producent was called Mrs. Sharp, and treated as deceased's wife.

4. Int. Deponent never heard deceased call producent his wife.

21. John Bayley. — William and his wife often invited deceased and producent to dinner, by name of Mr. and Mrs. Sharp; deponent esteemed them to be man and wife; and producent after deceased's death used to come to William's house.

Witnesses for William Sharp.

1. Eleanor Booth. — Deponent knew deceased and Ann by their lodging near deponent; she passed for deceased's wife, and went by his name, but deponent never heard him call her wife; gives Ann a bad character; says she kept company with lewd men while she lived with deceased, as she has herself told deponent; and used to pick up men and bring them home with her; and she used to get drunk.

2. Int. Deponent was acquainted with Ann only two months. 4. Int. Deponent esteemed Ann and deceased to be married; and they owned it. 5. Int. Proves William treated ministrant as a sister; deponent always esteemed them to be husband and wife. 17. Int. William called her by name of Sharp.

2. Elizabeth Chambers. — Deponent's daughter is wife to William Sharp; deceased and Ann did not behave to each other as man and wife;

for he did not call her "my dear Nan," &c. but "Nan" and "Brim." Upon talking of marriage, Ann said she was married at Cripplegate Church ; deceased, who was present, said it was a damned lie ; from thence deponent believed they were not married.

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7. Int. It was rumoured that deceased had run away with Ann Banks ; ministrant was godmother to a child of deponent's daughter. 10. Int. William entertained ministrant at his house after deceased's death.

3. Eleanor Read. — Deponent is sister to William's wife ; says deceased and Ann did not live with reputation as man and wife ; she was a drunkard.

8. Int. Ministrant was at the christening of deponent's brother's child.

4. Thomas Read. — Deponent is husband to Eleanor Read ; does not know whether deceased and Ann lived together as husband and wife or not.

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Upon this evidence there being some proof of a fact of marriage by one witness, and cohabitation and an uniform owning by both parties, and their relations, and particularly by William Sharp, who had been the party in the cause, I pronounced for the marriage and for Ann's interest, and condemned the executors in costs, to be paid out of their testator's assets.

Upon this cause, the case of *Bond and Bond*, in the Prerogative, in which case I gave sentence on 27th November 1754, was mentioned : the case was thus ; John Bond had lived with Sarah as his wife for many years, and had eight or nine children by

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her, six of whom are living; she was at first his servant, and he had a bastard by her, but afterwards he declared he had married her, and from that time they constantly lived with reputation as man and wife, and were esteemed such; all but the first child were baptized as legitimate; the deceased's nearest relations and neighbours, who were examined in the cause, swore they treated and esteemed her to be the deceased's wife, and particularly that William Bond, the deceased's son, by a former wife, always, during his father's life, treated and behaved to her as his father's wife; upon the deceased's death, Sarah, as widow, prayed administration, and was opposed by William Bond, the son, who denied her interest; she pleaded a fact of marriage by a particular clergyman, one Moses Thomas, at Penkridge, in Staffordshire, but she failed as to proof of the fact of marriage, and of the death of Moses Thomas, to either of which she did not examine any witness, but she fully proved reputable cohabitation, uniform owning, and particularly by the son, and also the birth and baptisms of several children as legitimate, and entries of such baptisms in the parish register.

Upon this evidence I pronounced for the marriage, decreed administration to her, and condemned the *son* in costs.

**By-Day,
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PELHAM *against* NEWTON.

A testatrix directs her executors to deliver up parcels unopened to certain persons named. The Court decreed these parcels to be opened in the presence of the Register, a schedule to be made of the contents, and to be proved as a codicil.

presence of three witnesses; appointed Mr. Hay, Colonel Pelham, and Mr. Cust, executors, and gave the residue to Colonel Pelham. On 25th April 1754 she made a codicil, marked B. signed by her, but not witnessed; 8th May 1754, made a codicil, marked C. all of her own hand-writing; 13th May 1754 made another codicil, marked D. at the bottom of her will, which she signed; 20th August 1752 made another codicil marked E. signed by her; 7th June 1753 made another codicil, marked F., wrote but not signed by her, and she also wrote a paper marked G. in which she directs her executors to deliver certain parcels sealed up, and directed to certain persons, which were in a small iron chest, to the persons to whom they were directed, unopened; and desired those persons would not tell one another what was contained in their respective papers. In her will there was a clause to this effect, that such papers as should be found signed by her, and such parcels as should be found directed by her, should be taken as codicils. A caveat was entered by Mrs. Newton, second cousin and next of kin to deceased, she prayed scripts and scrolls, which Colonel Pelham gave in with an affidavit; Mrs. Newton's proctor declared she would give no opposition. Colonel Pelham in court declared he was willing to take probate of the will, and all the above-mentioned papers, but desired the opinion of the Court what he ought to do with respect to the parcels; whether he ought to deliver them unopened or not?

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I was of opinion he could not safely deliver them unopened, for if he should be called to an inven-

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tory, he could not give in one on oath, without knowing what was contained in those parcels, and if he assented to them as legacies, and there should not be assets sufficient to pay the debts, he would be guilty of a *devastavit*. I therefore decreed those parcels to be opened in presence of the register, to see what was contained in them ; they were accordingly opened in court, and they contained bank notes, some of 20*l.* and some of 30*l.* each, of which a schedule was made, of the names of the persons, and of the sum contained under each person's name, to be added as a codicil to the will, and decreed probate of the will, and all the aforesaid papers to the executors.

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GASCOYNE against PRIDDLE, by her Guardian.

Objection to
pleading the
hand-writing of
living persons,
over-ruled.

Dr. Hay, for Gascoyne.—Martha Priddle, deceased, made her will dated the 13th April, 1754, all wrote with her own hand ; executed it in the presence of her mother and sister, appointed Edward Gascoyne executor and residuary legatee ; Ann Priddle, deceased's sister, by her guardian opposed the will ; Gascoyne propounded it, and called in the mother and all the next of kin to see the will proved by witnesses by citation with intimation ; nobody appeared but the guardian for Ann Priddle ; the executor gave in an allegation, in which he pleaded the handwriting of deceased's mother and sister as witnesses to the will.

Dr. Pinfold, for Ann Priddle.—Said deceased had made other wills subsequent to this, by which

this was destroyed ; and from thence the opposition to this will arose ; he objected to the allegation that the mother and sister were living, and therefore their handwriting could not be pleaded, for when persons are living, their testimony must be had either as witnesses, or by their answers.

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But I was of opinion it was proper to plead their handwriting under the circumstances of this case ; for first, without pleading their handwriting Gascoyne could not have their answers to that fact ; secondly, the mother did not appear, and therefore, he could not have her answers ; but yet as she was made a party, and they proceeded against her *in pænam*, they could not examine her as witness, and so Gascoyne would be deprived of that material circumstance that the mother and sister attested the will, if he should not be allowed to plead and prove their handwriting. I overruled the objection, and admitted the allegation.

STRATTON and STRATTON *against* FORD and
Others.

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Dr. Hay, for Susannah Stratton.—John Stratton, Esq. deceased, made a will and two codicils ; appointed his widow Susanna Stratton, John Stratton and William Ford executors. The will and first codicil are admitted on all hands to be good ; but Mary Ford, cousin and next of kin to deceased opposes the second codicil ; by the will she has a legacy of 1500*l.*, which is revoked by the second

Not usual to
grant an admi-
nistration pen-
dente lite to ei-
ther of the par-
ties contesting
suit, but to
some indifferent
person.

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codicil; all parties agree that it is necessary to have an administration *pendente lite*, but the question is, whether it shall be granted to all the executors jointly, or to the widow, Susanna Stratton solely, or to one named by her? John Stratton has by his proxy consented that it shall be granted solely to the widow, or to a person named by her. William Ford, the other executor, who is son to Mary Ford, the party joins with his mother in desiring it should be granted to all the executors; the widow, who has the residue of the personal estate is principally interested; the inventory amounts to 22,475*l.* 6*s.* 11*d.*; the legacies, supposing the second codicil to be good, amount only to 3,600*l.*, so the residue is 18,875*l.* 6*s.* 11*d.* The effect of the administration will in a great measure be defeated if Ford the executor is joined in it.

JUDGMENT—SIR GEORGE LEE.

I thought inconvenience would arise from granting administration to all the executors; it has not been usual to grant it to any of the parties, but to some indifferent person; the widow has the greatest interest, and John Stratton joins with her. I therefore decreed administration *pendente lite* to be granted to a person to be named by the widow, giving security, who shall justify on oath to the full value of the inventory, and notice of the name of the sureties to be given to the other party three days before the administration passes under seal.

PREROGATIVE COURT.

GIRARDOT BUISSIERES *against* ALBERT, by her
Guardian.By-Day,
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Dr. Paul, for the Uncles.—Girardot Reau deceased made a will, dated the 30th June, 1735, appointed John Macguire and Andrew Girardot executors; Macguire died before the testator; Andrew Girardot survived him, but died without taking probate; all the legatees named in the will are dead; the deceased died a bachelor, leaving three uncles by his mother, and a nephew and niece by two sisters; the uncles are in the same degree of kindred as the nephew and niece, as appears by the *arbor consanguinitatis*; this case must be ruled by the statutes.—Stat. 31 Edw. 3. Administration shall be granted to the next most lawful friend. Stat. 21 Hen. 8. c. 5. and stat. 22 & 23 Car. 2. c. 10. give administration to the widow or next of kin; the only question is, whether the uncles and the nephew and niece are not in the same degree of kindred to the deceased; if they are, they are equally entitled to administration and distribution.

In cases of intestacy, nephews and nieces never take by representation.

When they concur with a brother or sister, they take *per stirpes*. In other cases they take *per capita*.

Dr. Simpson, same side.—Uncles are not excluded by nephews or nieces; civil law directs in cases testamentary, no representation beyond brothers' and sisters' children, and representation then takes place only when a brother or sister to the intestate is living. *Walsh and Walsh*, Precedents in Chancery, 754. Prerog. 1714, *Flower and Flower*. Prerog. 1736, *Pearce against Pearce*. Prerog. 1724, *Davis against Davis Harris and Page*; in all those cases, held that the uncle was in equal degree with the nephew.

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Dr. Hay, for Ann Albert, the Niece.—The question is, whether the uncle is entitled to distribution with the niece? In *Flower's* case, the uncle's right was determined only incidentally; the nephew or niece is entitled *jure representationis* by stat. 22 & 23 Car. 2. c. 10. sect. 6. Secondly, in her own right the niece is preferable to the uncle by common law; the brother as to lands, is in the first degree, 1 Vent. 423, *Collingwood's* case; and so his son or daughter is in the second degree, 1 Peere Williams, fol. 50., *Blackburn* and *Davis*; with regard to personal estate, the law of the land is the rule. The Civil Law prefers the brother to the grandfather; Law of the Twelve Tables, altered by the *Senatus Consultum Tertullianum*: by *Code de Success.* the sister is preferred to the grandmother, Novell. 118. ch. 2. Voet. lib. 38. tit. 17. st. 13.; the brother succeeds with the father, Vinnius *ratio succedendi*, lib. 3. tit. 5; Chancery, January 14, 1754; *Evelyn* against *Evelyn*—John Evelyn died intestate, the question was, whether Charles Evelyn, the brother of the intestate was entitled to his whole personal estate, or whether Sir John Evelyn, the intestate's grandfather should share equally with him? Lord Chancellor Hardwicke decreed the whole to the brother; upon that cause these cases were cited, which are not in print—*Poole* against *Wilshaw*, Chan. Bill, brought by a grandmother to share the intestate's estate with the brother, held the brother should take all; 20th November, 1749, at the Rolls, *Norbury* against *Vicars*, same determination. By the Civil Law, the computation of degrees is made through the grandfather to the uncle; in stat. Car. 2. there are no exclusive words to hinder a niece from taking by representation, though the intestate did not leave a

brother or sister; determinations should be uniform between this Court and Chancery.

JUDGMENT — SIR GEORGE LEE.

I said that it was a settled point that nephews and nieces never took by representation, but when they concurred with a brother or sister of the intestate; in other cases they took *per capita* in their own right, as in the case cited of *Walsh* and *Walsh*. The common law with respect to lands did not compute the father, but reckoned brothers in the first degree, without the mediation of the father, but that was founded on the principles of the feudal law, which would not suffer lands to ascend to the father, because he was presumed to be old, and not so fit as the brother for military service; the case of *Evelyn* and *Evelyn*, and the others cited in that case, were not in print, and therefore one could not see exactly upon what those determinations were founded; possibly the questions might arise upon money, that by settlements or agreements, was to be laid out in lands, and if so, it is to be considered as land; but be it as it will, I could not, upon a case mentioned, by information, vary from settled determinations in this court. The uncle and nephew are clearly, by the Civil Law, (which rules in this court in testamentary cases), in the same degree of kindred, viz. in the third degree. Sir Charles Hedges, in *Flower's* case, and Dr. Bettesworth, in *Pearce's* case, determined that the uncle was equal in degree and distribution with the nephew; and by the statutes, the ordinary is ministerial to grant administration, and make distribution to the next of kin in equal degree. I cannot vary from the determinations of this court, and therefore I pronounce that the uncles are equally entitled to distribution with the

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By Day after
Michaelmas
Term,
December 11.

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niece and nephew; and as the latter are both minors, I decree the administration to the uncle who has prayed it, viz. Buissieres.

By-Day,
December 11.

**NAYLOR, by her Guardian, against STAINSBY,
formerly LEAH.**

An executrix
appointed by
implication.

Edward Catlin, deceased, left Naylor, a minor, his niece and next of kin: he made his will, wrote by himself, gave a legacy therein to Eleanor Taylor, who died before him, gave legacies to several other persons, among the rest, gave several legacies to his daughter-in-law, Mary Leah, now Stainsby, immediately after which legacies follow these words: "*But should the within-named Mary Leah be not living, I do constitute and appoint Eleanor Taylor my whole and sole executrix of this my last will and testament, and give her the residue.*" The counsel for Naylor, the niece, insisted that Eleanor Taylor was appointed executrix and residuary legatee, and that she having died before the testator, he was intestate as to the residue, and that administration *cum testamento* must be granted to the niece, Naylor, as next of kin. On the contrary, the counsel for Mary Leah insisted that she was appointed executrix by implication, and that Eleanor Taylor was only substituted executrix, &c. in case Leah should die in the testator's lifetime, and consequently that probate ought to be granted to her; and upon consideration of the will, I was of that opinion, and decreed probate to Mary Leah now Stainsby, as executor (a) by implication, according to the tenor of the will.

(a) Many ways and by divers words one may be made executor, although not expressly so named in the will. Wentworth, O. E. p. 9.—See also *Grant v. Leslie*, and the authorities cited on this point. 3 Phill. 116.

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BROTHERTON, surviving Executor of LADY COOPER WINFORD, alias HELLIER, against HELLIER, by his Guardian, and BARRINGTON.

Dr. Hay, for Samuel Hellier, by his guardian.
—Samuel Hellier, Esq. left at his death a widow, the Lady Cooper Winford, whose first husband was Sir Thomas Cooper Winford, and a son by a former wife, Samuel Hellier, the minor, and party in this cause ; pending the suit Lady Winford died, and made Brotherton her executor. On the deceased's death, caveat was entered on behalf of the son, who chose one Elizabeth Harris, his guardian ; this caveat was warned by the widow ; Samuel, the son, who was the deceased's only child, propounded a will marked No. 2, which appears to be cancelled, but with which will annexed, his guardian prays administration may be granted to her, for the use and benefit of the minor ; the single question will be, whether this paper was not uncancelled at deceased's death ? The deceased died on Friday 22d November 1751 ; the will is dated 12th February 1735-6 ; all wrote by deceased, it was executed in presence of three witnesses, this will was made during the life of his second wife, the mother of his son Samuel ; but before said son was born, he made his wife sole executrix, and substituted his child, if he should have any by her. On 10th October 1751, deceased, being then in a bad state of health, sent for Mr. John Harris, who lived about eight miles from him, in Staffordshire, and was his uncle and attorney ; when he came, deceased told him he had made a will, and then gave him verbal in-

A will found
cancelled :
doubtful whe-
ther cancelled
by the deceased ;
but if it were ;
the court held
to be revived by
declarations of
the deceased ;
and by the in-
structions he
had given for
making a codicil.

PREROGATIVE COURT. structions for making a codicil, and deceased desired it might be kept private from his wife, Lady Winford, and ordered Harris to get the codicil settled at London, pursuant to his said verbal instructions, and then said his will was in his upper study ; Harris drew a codicil, and shewed it to Mr. Thomas, one of the clerks in chancery, who corrected and settled it. On 12th November 1751, Harris returned home from London ; in his absence deceased sent for him, and again on the 14th November, he sent to Harris to come to him immediately on business of consequence, which he said Harris knew of, next day Harris went to deceased with the codicil marked No. 1 ; when Harris came, Lady Winford was in the room with deceased, and as soon as she went out of the room, deceased asked Harris if he had brought the codicil ; Harris delivered it to him, and deceased began to read it, but Lady Winford returning, deceased put it into his pocket, she staid all the rest of the day in the room with deceased, but at night deceased told Harris he would rise at eight the next morning, and then the affair should be done ; deceased accordingly did rise at eight the next morning, which was two hours before his usual time ; Lady Winford having notice of deceased's rising, came to him in three or four minutes, and staid with him all the morning till his physician came, who allowed him to be carried down stairs, and he had company with him all that day ; at night, Harris said he must go home ; deceased desired him to return on Wednesday, 20th. On that day deceased was engaged in business with his tenants, and his wife was present, so nothing was done ; he, Harris, staid till the next day, but deceased was still prevented from

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doing any thing; Mr. Harris then appointed to come again on the 2d of December, deceased desired him to be punctual, one Mr. Onion was then present. The codicil, No. 1, was found in deceased's pocket the night he died. Lady Winford was deceased's third wife, he had great affection for his son. Before marriage with Lady Winford, an agreement was made that she should settle 200*l.* a-year, of her estate, on deceased for life, then to her for life, and the issue of their bodies, remainder to Mr. Hellier's heirs; and he settled 200*l.* a-year on her in the same manner. They were married in 1746, she never would carry this agreement into execution on her part, but he did on his; the codicil was partly made to enforce this agreement, for he left his wife legacies therein, on condition she carried the agreement into execution. The codicil revokes the appointment of Lord Ward as executor of the will, but he is not named an executor in the will; Harris says it was his mistake, arising from deceased saying Lord Ward should not be executor. Search was made on 23d and 24th of November for a will in deceased's upper study, but none found, till Lady Winford directed them to look in the yellow room; it was found cancelled in a bureau in said yellow room; Martha Founds admits she put papers by deceased's orders into said bureau. Founds, on finding the will, declared that about a fortnight before his death deceased bid her lock up some papers in the said bureau, and she saw the will among them; five or six weeks before his death, he ordered new locks to be put on this bureau; the deceased esteemed this paper to be his will; in 1748 he recognised it to Daniel Williamson, and said it was made in his former wife's time,

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PREROGATIVE COURT. and that Daniel's mother was a witness to it ; she is a witness to the will pleaded ; a year before he died, he recognized it to Onion, and in the April before his death he told Sarah Huntback that he had taken care that Harris should not be a trustee for his son, and Harris's name as a trustee is struck out of this will ; Sarah Wheeler says, that about a month before deceased's death, she was dusting deceased's room, and then found this will wrapt up carefully, and another witness confirms her ; Wheeler saw this will again on the 23d November, and found it in a drawer of the bureau in the bow-window room ; on the 24th November, in the evening, it was found in the yellow room ; William Tolly, deceased's servant, took his keys, did not give Harris the key where this will was, but kept it from deceased's death to the 24th November at night. We suppose, Tolly took the will out of the bureau in the bow-window room and cancelled it, and then put it into the scrutoire of the yellow room ; Tolly and the two Wrights are legatees in Lady Winford's will and codicils. Two points — first, we shall insist there is strong presumptive evidence that it was cancelled by direction of Lady Winford. Second, that it was not cancelled by the deceased ; many witnesses swear they believe Lady Winford would not be guilty of cancelling a will.

Dr. Smalbroke, same side. — Deceased's bond for securing the marriage agreement was delivered to Mr. Willmott, Lady Winford's brother ; two years after, Willmot returned it to deceased ; about a month before deceased's death, he had his papers brought down from the upper study, and this will was brought down with them ; a fortnight

after, deceased ordered it to be put into the bureau in the yellow room ; Tolly was to watch the corpse the night deceased died, but his lady would not let him ; we conclude that he lay in the bow-window room in order to cancel the will. Founds swears directly contrary to her declaration ; on the 24th November, William Wright desired Sarah Wheeler to take no notice that she had seen the will before deceased died.

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Dr. Pinfold, contrà, for the executor of Lady Winford.—Deceased died about six in the evening of Friday, the 22d November, 1751 ; his son by his second wife was aged about 15 ; he appears by his guardian Elizabeth Harris ; the will is cancelled by tearing off the name and seal ; they pleaded that this will was uncancelled at deceased's death, and that Tolly saw it uncancelled after deceased's death, they moved to examine Lady Winford and Tolly on interrogatories, but the Court rejected the motion. Lady Winford's character is material ; Sarah Huntback, grandmother to the minor, swears she believes Lady Winford would not destroy a will ; though deceased was in a bad state of health, his death was sudden and unexpected, when it happened ; she fainted away on being told of it, she that night desired Mr. Draper to send for Mr. Harris, Dr. Wilkes, and Mrs. Huntback ; Harris came that night, the others the next day ; Harris said there was a will as deceased had told him in the upper study ; search continued all the 23rd and 24th November in vain ; Lady Winford asked them if they had searched the bureau in the yellow room ? they said, "No," and then went and found it cancelled in the bureau there ; no witness saw it uncan-

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celled. We have proved Lady Winford left Harris and deceased alone, and that there was full opportunity for deceased to have executed the codicil if he had thought proper. Wheeler tells a strange story about the will ; says she cannot tell whether it was uncancelled when she saw it ; Harris lay in the yellow room with Draper the night deceased died, where the will was found ; deceased was very busy some time before his death in sorting his papers ; Tolly kept the key of this bureau in deceased's lifetime, Tolly lay with Wright in the bow-window room, they have both sworn that they were not out of their beds from about twelve of the clock that night till seven the next morning. We rely on the insufficiency of their proof.

Dr. Bettesworth, same side,—There are but two of their witnesses who give Lady Winford a bad character.; a multitude of witnesses give her a very good character ; Harris has spirited up this cause, and he attempted to prevent deceased's marriage with Lady Winford.

Witnesses for Hellier.

1. John Harris. gent.—Deceased's mother was deponent's sister by the half-blood ; he died the 22d November, 1751. On the 10th October, 1751, deponent waited on deceased upon receiving a letter from him, deceased directed deponent to prepare a codicil to his will, which he said he had made, and was in his study called the Chaos, he gave deponent verbal instructions for a codicil ; deponent prepared a codicil from such instructions ; deceased did not declare that Lord Ward was an executor to his will, but said as there was likely to

be a dispute between Lord Ward and him, he would not have him for executor, or trustee to his son ; before such dispute there was a friendship between Lord Ward and deceased, and from such discourse deponent imagined he was an executor and trustee in his will, and therefore, deponent of his own accord inserted in the codicil a revocation of Lord Ward, but had no direction from deceased to that purpose ; after deponent had prepared such codicil, and had got it settled in London, deponent waited on deceased the 14th or 15th of November, and carried the codicil with him ; but deceased, who deponent believes had an intention of executing it without the knowledge of Lady Winford, was prevented from doing so, or of reading it over with deponent by her frequently coming into the room ; deceased began to read over said codicil, but hearing her coming into the room, he put it in a hurry into his pocket ; deponent never saw said codicil after that time till deceased's death. On the 22d November, 1751, deponent went to deceased's house and lay there that night ; next day, deponent asked Tolly what keys deceased had in his pocket at his death, he then gave deponent two small keys, and said they were all deceased had in his pocket when he died, which keys belonged to drawers of no consequence. About six in the morning of the 24th November, by direction of Lady Winford, deponent and Draper went to search the bureau in the yellow room for the will, Tolly attended them, and took a key out of his pocket, and they opened several drawers, and there found the will cancelled ; Draper found it, and in the next drawer there was a music-book on which deceased used to write. On that night, deponent asked Tolly why he locked up said book,

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he answered, that he did not know but that there might be receipts in it ; Tolly said he did not give deponent the key of this bureau, because it lay on the table at deceased's death, and deponent had asked only for the keys in deceased's pockets ; deceased several times told deponent of the marriage agreement, as stated above, and that he had given bond for performance on his part. The deponent knows deceased was uneasy because she would not carry the agreement into execution ; and has heard him threaten to compel her ; believes he continued dissatisfied when he gave the instructions for the codicil ; deceased gave her legacies in the codicil, on condition of her performing said marriage agreement ; proves identity of the draft of the codicil ; proves exhibits K. and L. letters from deceased to deponent to be deceased's handwriting, deponent was attorney to deceased, never heard deceased declare the least intention of cancelling his will, when he gave instructions for the codicil, deceased expressed great displeasure at his wife's not having performed said agreement. The Sunday after deceased's death, Tolly came to deponent, and asked for a guinea to buy necessaries for the family, for Lady Winford said she had no money ; deponent on that day saw two purses of money on her table. The deceased had real affection for his son.

The same John Harris on another allegation.— The will, No. 2, dated 12th February 1735-6, is the deceased's writing. On 10th October 1751, deceased sent for deponent to come to him, deponent went, deceased told deponent he had made a will, and then gave deponent instructions with great privacy, verbally, for drawing a codicil to his said will ; deponent could not reduce them into

writing, because Lady Winford was almost all the time in the room; deceased ordered deponent to get it settled in London, and said he would then execute it, at the same time said his will was in his upper study. Deponent returned from London on 12th November 1751, found a message from deceased, codicil was settled in London by David Thomas, deceased sent again for deponent on 14th November; deponent went to deceased with the codicil No. 1, the deceased was then sitting in the yellow room, and his wife with him: when she went out, deceased asked deponent if he had brought a codicil, deponent gave it him, he began to read it, but Lady Winford returning, he put it in his pocket; she staid all the day with deceased: at night he told deponent he would rise at eight next morning to finish the business; deceased did rise at that hour, and deponent was just come to him in the morning when Lady Winford also came, and staid with him all the morning till Dr. Wilkes came; the doctor asked deponent if deceased had made a will; deponent said, "Yes," and he had a codicil ready to execute; deceased had company all the afternoon, deponent went home that night. Deceased desired deponent to come again the Wednesday after, deponent went on Wednesday 20th November, and staid there till the evening of the 21st; Lady Winford and others were with deceased constantly both those days, deponent appointed to come again on 2d December to execute leases and settle the other affair as the deceased said: the deceased desired deponent to be punctual, for he had things of great consequence to execute. Believes deceased did not order the will to be cancelled on 20th or 21st November. Deponent went to de-

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ceased's house the night he died; codicil was found in deceased's pocket; Doctor Wilkes asked if Lady Winford knew where the will was, she said she believed there was none. Diligent search made for a will, but none found; about five or six in the evening of Sunday, November 24th, deponent and Draper went to Lady Winford, she asked deponent whether the will was found, deponent answered "No;" she replied, "You have not looked in the most likely place, suppose you search in the drawers in the yellow room, you don't know what luck you may have there;" she ordered Tolly to go with them, he brought the key and unlocked the drawers, they found in some of the drawers papers of consequence, but in one drawer found a music-book, which deceased used to write in, in another drawer they found the will No. 2, and a will of deceased's father's, and part of a will which the deponent believes was wrote after No. 2; Draper delivered them to deponent, deponent then declared he believed the will was cancelled since deceased's death; deponent carried the will to Lady Winford, and told her they had found the will, but somebody had torn off the name and seal; deponent read it to her, and she said she thought a paper so odd could not be the deceased's will, and she said she had seen that paper about a fortnight before, and that deceased gave it to Mrs. Founds to put in the drawer among his old or waste papers; Founds said, "My lady, it was not so," for deceased bid her lock them up for they were things of consequence; a dispute arose thereon between them, Founds said she would swear what she had said was true. Deponent on 23d November, asked Tolly for all the keys he found in deceased's pocket, he gave deponent two small keys,

but he did not give deponent the key of the drawers in the yellow room ; deponent asked Tolly why he did not deliver that key ? he answered, because it was not in deceased's pocket.

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2. John Kay. — Deceased lay in a bedchamber below, and was carried in the day into a parlour ; on 24th November 1751 deponent was present at a search in deceased's study, says Lady Winford said, she thought the most likely place to find the will was in the drawers of the yellow room among deceased's old papers ; they went thither, and found it ; Lady Winford said, on the will being read, she thought no one in his senses could write such nonsense. Mrs. Founds said deceased delivered it to her, and she observed it was endorsed "the last will of Samuel Hellier," &c. and ordered her to lock it up with other papers in his drawers in the yellow room, and bid her not break the lock or key, for it was a thing of consequence. A dispute arose between Lady Winford and Mrs. Founds, and the last swore that what she had said was true ; same night Tolly told Harris he did not give him the key of said drawers, because it was not in deceased's pocket.

3. John Stevens. — Deponent was servant to deceased at his death ; deceased ordered new locks to be put on the drawers in the yellow room ; Lady Winford was uneasy at Harris's being with deceased ; about five or six minutes after deceased's death, deponent observed a music book in the room where he died.

4. Mary Kay. — Agrees with the other witnesses as to the dispute on finding the will, and Found's declaration thereon ; Mrs. Founds said she had read that one of said papers was deceased's

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last will ; Tolly owned he had locked up the music book after deceased's death.

5. Richard Wilkes, M. D. — Deceased not capable of going up stairs without assistance ; blanks left in the codicil ; Harris, on 23d November, told deponent he was sure there was a will ; for deceased told him so, and that it was in his upper study.

6. George Draper, Esq. — Harris lay with deponent the night deceased died. Lady Winford declared she never saw, or heard of any will, and believed there was none ; Harris said he believed one reason for making the codicil was to strike out Lord Ward from being executor ; Lady Winford advised them to search the drawers in the yellow room ; they searched, and found the will ; Harris and deponent only were present at finding it.

2. Int. Deceased died in the stone parlour below stairs ; respondent was in the house when he died ; Harris and deponent lay that night in the yellow room, deponent went to bed at eleven in the evening, and Harris came to bed between twelve and one, deponent in the morning left Harris in bed, and that night no person came into the room to them ; deponent did not lie in that room the next night, but Dr. Wilkes lay there.

7. James Davison. — Deponent was gardener to deceased ; says deceased put new locks on the drawers in the yellow room ; Lady Winford was remarkably diligent in attending deceased when Mr. Harris was with him, and deceased seemed uneasy thereat ; Harris was at deceased's two days before his death, and Lady Winford was then constantly in the room with them ; Harris was to come again in about ten days ; Tolly took the codicil out of deceased's pocket ; Keighton, an old

servant of deceased's, was sent for to give information whether he knew any thing about deceased's will; Tolly agreed to sit up with deponent to watch deceased's corpse the night he died, but Lady Winford ordered that he should not sit up, because he had been a good deal fatigued with sitting up with deceased; believes William Wright lay that night with Tolly, deponent suspected Tolly meant to make an ill use of deceased's keys, believes Tolly was not in the yellow room; deponent heard somebody walking about the bow-window chamber late at night.

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8. Thomas Matthews. — The beginning of October 1751, deceased sent for Harris to come to him on business of importance to be transacted; and sent for him again on the 14th of November; Harris came, and Lady Winford staid constantly in the room with them; on 20th November, Harris came again, and Lady Winford was then always with them; deponent was in the room when deceased died; the music book lay on the table; but deponent does not believe any key was on the table.

9. David Thomas, gent. — In October or November, 1751, Harris told deponent he had instructions for making a codicil for deceased; deponent read and settled it.

10. William Tolly. — Deponent was servant to deceased; about a week after deceased's death the will was found; deponent never saw it before; Harris was frequently with deceased; deceased sorted his papers and bid Mrs. Founds put them in the drawers in the yellow room, on which he had put new locks; Lady Winford used to leave deceased when Harris was with him or business;

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deponent found the codicil in deceased's pocket and put it in the yellow room drawer; search was made for deceased's will several days after 24th November, but it was not found till about a week after; deponent had custody of deceased's keys for a month before his death, and used in a morning to lay the key of the drawers in the yellow room on deceased's table; deponent offered Harris all the keys, but he refused taking them; Harris was in a passion when the will was found cancelled; deponent never told Keighton that he had done wrong in coming to deceased's house after his death to be questioned about the will; deponent had no orders where he should lie after deceased's death; deponent and Wright lay in the bow-window room the night deceased died, and were not out of bed from twelve at night till seven the next morning.

11. Elizabeth Wright.—Deponent was servant to deceased; deceased often sent for Harris a short time before his death; Lady Winford seldom staid with deceased when Harris was with him; deponent has often heard her say, she wished deceased would make his will; in the evening of the 24th November, deponent went into Lady Winford's room when the will was reading by Harris, but directly went out again.

12. Sarah Chauntry.—Proves execution of the will dated the 12th February, 1735-6.

13. Mary Williamson.—Likewise proves the execution of said will on Sunday evening, the 24th November; Founds said she had seen a paper about a fortnight before deceased's death, on which was written, "This is the last will of Samuel Hellier," and deceased bid her put that and the other papers into the drawers in the yellow

room, and bring him the key, for they were papers of consequence.

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14. Richard Onion.—On the 21st November, deponent was present when deceased said to Harris on his going away, that he desired him to come again on the Monday se'nnight to do some business of consequence, which Harris knew of, and if he did not come he should forfeit a bowl of punch; Harris promised he would come, Lady Winford was not present. On the 24th November, Lady Winford said, the most likely place to find the will was in the yellow room, Harris soon after brought the cancelled will, and read it. About half a year before deceased died, he said to deponent, that no person who had any thing to leave should be without a will by him.

15. William Wright.—Deponent by deceased's orders brought down to him some of his papers from his upper study; deponent lay with Tolly the night deceased died; they were in bed from twelve that night till seven the next morning, and had no light in the room.

5. Int. Says his master told him Harris would give him 50*l.* if he would say that he saw the name and seal on deceased's will after deceased was dead, but at the same time he bid deponent not to forswear himself; deponent said he knew nothing of the will; Harris himself never offered deponent anything.

16. Martha Founds.—Deponent never saw the will pleaded after or before deceased's death to her knowledge till Sunday, the 24th November; Harris said in a passion, that it was cancelled. deceased bid deponent lock up some papers in his drawers, and to take care not to break the key;

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deponent did lock them up, and gave deceased the key ; deponent did not see any indorsement on any of the papers, purporting any of them to be the will of deceased, nor did know that any of them was ; deceased did not say they were papers of consequence, nor bid her take care of them, but said the key was of consequence ; 23rd November, Lady Winford declared, she wished if deceased had made a will it might be found, but she knew of none.

17. James Davison, on a second allegation.— Deceased wrote on a music-book ; on Monday se'night, after deceased's death, several boxes were sent to London ; deceased had great affection for his son ; Lady Winford a person of indifferent character ; believes she would be guilty of cancelling a will.

18. Richard Hollys.—About a year before deceased's death, He was looking among papers, and taking up one of them, said " This is my will ;" affection to his son ; Lady Winford a person of bad character, with respect to her sobriety.

19. Mary Williamson.— Deponent never was witness to any will of deceased's but that which is propounded in this cause, and deponent is a witness to this will ; deponent is mother to Daniel Williamson ; the evening deceased died, Mr. Founds brought a purse of money to Lady Winford ; deceased had affection for his son.

20. Richard Oaion.— Lady Winford while deceased lay dead in the house, sang and behaved indecently ; Founds brought a bag of money to her ; affection to his son.

21. Sarah Huntback.—Deponent is grandmother to young Sam. Hellier ; Lady Winford be-

haved indecently on deceased's death, she pretended she had no money, but afterwards it appeared she had.

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22. Mary Kay.—The music-book was of no consequence; Tolly put it into the drawers; deceased wished his second wife alive; says Lady Winford sung on the Sunday night after deceased's death, but she was then very much in liquor; she has a very bad character.

23. Rev. William Kay.—Deceased expressed great dissatisfaction at his wife's not having performed her marriage agreement; deponent often talked to deceased about making his will, but he never would give deponent any answer; deceased expressed affection to his son.

24. John Kay.—Lady Winford behaved indecently the night deceased was buried; believes she would not scruple to do anything bad to prejudice the minor.

25. Silas Stevenson.—Gives Lady Winford a very bad character, and particularly since deceased's death; believes she would be guilty of cancelling a will.

26. Robert Lascelles.—For 14 years past, Lady Winford has borne a bad character.

7. Int. Does not believe she would cancel a will.

27. Rev. Charles Willmot.—Deponent is brother to Lady Winford; proves the marriage agreement; says he delivered up the bond to deceased; deceased was a good husband.

7. Int. They seemed to live affectionately together; does not believe she would cancel a will, &c.

28. Thomas Matthews.—Deponent saw no key on deceased's table when he died; has heard de-

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29. Sarah Wheeler.— Deponent was servant to deceased ; all the family knew of the search for the will ; three weeks or a month before deceased's death, deponent was dusting the top of a chest of drawers in the bow-window chamber, in which room deceased used to lie till a week before his death, and upon taking up some plain paper to dust under it, a written paper folded up dropped out of it, which was indorsed, "The last will and testament of Samuel Hellier ;" deponent took it up, and read part of it, and it appeared to be a will of deceased's, and after deponent had read near the first side, she put it again into the paper it had dropped out of ; Elizabeth Chapman was present ; deponent well remembers, deceased therein mentioned his precious relict Sarah Hillier, and that his late wife Margaret's remains should be removed to the family vaults. On the 23rd November, deponent said she had seen a will of deceased's, and mentioned said paper, and then Mrs. Wright bid deponent go and see if she could find it ; deponent went, and found it in the bottom drawer of the chest of drawers in the bow-window room ; deponent went and told Wright she had found it, and they both looked over it, and then Wright went to tell her lady, and when she returned, she said her lady would leave it remain where it was, and desired deponent would say nothing of it ; but deponent does not know she was enjoined secrecy by Lady Winford's order ; the will propounded is the same predeposited of ; cannot tell whether it was cancelled at said times when deponent saw it or not ; Tolly and Wright

lay in the bow-window room the night deceased died, but never at other times ; Lady Winford was very much addicted to drinking : William Wright came to deponent and bid her not take notice that she had seen deceased's will.

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Int. Cannot say whether the interlineations were in the will when she first saw it or not.

30. Elizabeth Chapman. — Confirms Sarah Wheeler as to finding the will in the bow-window room about a month before deceased's death, and says Wheeler read part of it to deponent, who was then present ; cannot tell if it was then torn or cancelled, but to the best of her remembrance it was not torn ; on the 23rd November, deponent saw said paper in a drawer in the same room ; says William Wright came with a message to Sarah Wheeler.

31. John Baker, Esq.— Deceased paid interest for money deponent lent to Sir Thomas Winford.

32. John Spencer.—Proves deceased paid interest for a debt of Sir Thomas Winford's.

Int. Cannot think Lady Winford would cancel a will.

33. Sarah Huntback.— A codicil referring to a will was found in deceased's pocket after his death ; Lady Winford said she knew of no will ; on Sunday evening, when they were at supper, a message came to Harris from Lady Winford, that the likeliest place to find a will, was in the yellow room ; when the will was found, Lady Winford said, " that old thing I saw a fortnight ago ; " deponent has several times heard Mrs. Founds say deceased bid her lock up some papers, among which was the will, for they were of consequence. In April, 1751, deponent asked deceased whether he had taken care of producent ? he said that he

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Dec. 16-17. had taken care of him, and made good his promise to his dead wife, that Harris should have nothing to do with his son, the producent.

1. Int. The minor is respondent's grandson ; deponent was not advised with about setting up this will. 2. Int. Sarah Harris is related to the minor, but deponent knows not how. 3. Int. Sarah Harris is well acquainted with Lady Winford ; said Sarah Harris was chosen guardian by means of John Harris. 6. Int. In April, 1751, deceased said he had taken care that Harris should have nothing to do with the minor. 7. Int. Deponent cannot believe that deceased's will was destroyed by Lady Winford.

34. Rev. William Kay.—Lady Winford used to be very much with her husband ; she said she had seen the will pleaded some time before, and Mrs. Founds said deceased bid her put it in the drawer.

35. Titus Stevenson.—Mrs. Founds, on the 24th November, said she had seen the will before, and deceased bid her lock it up with other papers, and said they were of consequence.

36. Sarah Wheeler.—Says exactly the same as upon her former examination.

37. Elizabeth Chapman.—The same.

38. Elizabeth Wright.—Tolly used to keep deceased's keys. Deponent often heard Lady Winford wish deceased would make a will ; Lady Winford knew Harris was searching for a will on Saturday and Sunday ; Sarah Wheeler told deponent she had seen a will of deceased's in the bow-window room, deponent went up, but found no such will, and then Wheeler went up, and said when she came down, that it was in the lowest drawer, and she asked deponent if deceased's

former wife's name was not Sarah, deponent said "Yes;" deponent desired Wheeler to tell Harris of it, she replied, she would not, and added, that a bit was torn off the bottom; this conversation was on the 23rd November. Lady Winford behaved decently on deceased's death; deponent never mentioned said will to Lady Winford.

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39. Daniel Williamson.—In June, 1748, deceased told deponent he had been hit by his marriage with Lady Winford, but that he had taken care to prevent bad accidents by a will he had made by him; deceased said he had made his will in Mrs. Hellier's time, and that deponent's mother was a witness to it; proves exhibits K. and L. to be deceased's handwriting. In September, 1750, deponent went to Mr. Onion's house, next door to deceased, and staid there some time, during which time, Lady Winford once told deponent that deceased had a will by him, and that it was in his room, and deponent's mother was a witness to it, and that it was made in Mrs. Hellier's lifetime, and she would if she could, prevail on him to set that will aside, and make a fresh will.

Exhibits read.

Letter K. not dated.

Letter L. dated 7th October, 1751.

Will propounded, marked No. 2.

Codicil exhibited, marked No. 1.

Witnesses for Lady Winford.

1. Sir Edward Blount, Bart.—Gives Lady Winford a very good character; believes she would be no way concerned in cancelling a will.

1. Int. Respondent has not been conversant with her since 1730.

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2. Mary Knott.—Gives Lady Winford the best of characters; believes she would not cancel a will.

1. Int. Latterly, respondent had not much intimacy with Lady Winford.

3. Rev. William Bradley.—Deponent married Lady Winford's sister, and was very intimate with her; deceased and she lived together with great affection to his death: positively deposes that she has as good a character as any woman can have.

2. Int. Respondent was but once in her company, for three years before deceased's death.

4. Rev. Henry Saunders.—Deceased and Lady Winford lived very affectionately, and she constantly attended him to his death; gives her a very good character.

5. Gilbert Founds.—Deponent well knew deceased, and was very conversant in his family; when deceased was engaged in business she used to retire; great affection between deceased and her; deceased frequently said he would take care of her; she shewed great concern on his death; she bore a very good character; verily believes she would not cancel a will.

6. Martha Founds.—Deponent has known Lady Winford twenty years. When Harris came to deceased, Lady Winford almost always left the room, and she did so when Harris came to deceased a short time before his death; about a week or fortnight before deceased's death Harris was alone with him for two hours, and was with him the day before deceased died. Deponent was present when the will was found in the yellow room, it was not found by any direction of Lady Winford, otherwise, than asking if they had searched the yellow room; Lady Winford did not declare she had seen

said will a fortnight before ; deponent denies she declared deceased bid her lock up the will, and said it was of consequence ; the Thursday sen'night before deceased died, deponent by his order brought him all the papers in the yellow room, and afterwards put them up again ; deceased and Lady Winford lived together very affectionately ; deponent heard deceased declare a short time before his death, that he would take care of Lady Winford ; it is a false and scandalous story, that Lady Winford privately sent away deceased's effects for her own use : gives Lady Winford a very good character, verily believes she never deserved any ill to be said of her.

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7. Lemuel Lowe. — Lady Winford used to retire when persons were with deceased on business ; deceased and she lived very affectionately ; deponent received the rents of Lady Winford's estate, and paid them to deceased ; verily believes deceased was benefited by his marriage with producent ; she has a general good character.

1. Int. Respondent lived forty miles from deceased.

8. Richard Onion. — Deponent was tenant to deceased, and lived adjoining to his house ; deceased and producent behaved with great civility to each other, but never saw any great affection between them. Says Founds brought money to producent the night deceased died.

3. Int. In 1752 Martha Founds declared she would not be examined in this cause for Hellier.

7. Int. There was a dispute between Lord Ward and deceased. 8. Int. Deponent has often asked Harris, in deceased's lifetime, whether deceased had made any will ; Harris said he could not tell,

but about a month before deceased died, Harris

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Dec. 16-17. told deponent that deceased said he had a will, and Harris said he was to make a codicil for deceased, and told deponent the contents of such codicil. 9. Int. Deceased shewed great regard to Harris. 10. Int. Deponent has often heard producent say, deceased would not allow her any money, does not believe there was any real affection between them.

9. William Wright. — Deponent was carpenter in deceased's house for three quarters of a year; producent always left the room when persons were with deceased on business; the night deceased died, deponent and Tolly lay together in the bow-window room, and never were out of it till they rose the next morning, and there was no candle in the room after they were in bed. Producent and deceased seemed to live in great affection; says she has a general good character; deponent never desired Sarah Wheeler not to speak of her having seen deceased's will, and never carried her any message from producent.

10. Sarah Clare. — Deponent has seen producent go away and leave deceased and Harris alone together; believes deceased and producent lived affectionately; producent kept her chamber from deceased's death till after he was buried, and behaved very decently; producent bears a very good character; Tolly never declared anything about deceased's will to deponent.

11. Joseph Hindon. — Deponent has known producent thirty years; deceased and she appeared to live in the greatest harmony. Deponent has heard him express a great regard for her; gives a very good character of producent, believes she would not on any account cancel a will.

1. Int. Respondent lived eight miles from deceased.

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12. George Draper.—Producent always quitted the room when deceased went upon business; about three weeks before deceased's death, producent left him and Harris alone, and did not go into deceased's room till Harris came out. Wednesday before deceased's death, deponent went to his house, and on the day before he died producent left deceased and Harris alone, and bid the rest of the company come away out of deceased's room with her; Harris was then alone with deceased long enough to have done any business with him, or for deceased to have executed a codicil. Producent fainted away on hearing of deceased's death; deponent lay in the yellow room the night deceased died; producent said she knew of no will, but asked Harris if he had searched in the yellow room, and thereupon he and deponent went to search, deponent found the will cancelled, tied up with his father's will, and a preamble of a will; producent did not declare she had seen that will before, nor was there any dispute between producent and Mrs. Founds; producent was a very good wife, and there was a great affection between deceased and her; says producent behaved very decently on deceased's death; says producent used the expression "Tantarra, rogues all," upon finding Harris combining with others in her house against her; gives producent a very good character, but Harris has set about false stories of her drinking and whoring.

13. Rev. Charles Willmot.—Producent did not execute what deceased desired as to the settlement of her estate, because what deceased proposed was not adequate to her fortune; producent

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and deceased lived with great affection and respect to each other ; deponent has heard many scandalous stories of producent, but he verily believes they were without foundation, and that nothing could induce her to cancel a will, &c.

5. Int. Producent was not a drunkard, but she sometimes drank more than she ought ; the deceased shewed deponent some advices he had to prevent his marrying producent, and declared that John Harris put them into his hand. 6. Int. Believes producent to be a very virtuous women.

14. William Tolly.—Harris was alone with deceased for a considerable time, at two several times, a very little while before his death. Deponent did not lie in the bow-window room the night deceased died by order of any one ; William Wright and deponent were not out of bed till they rose next morning, and they had no candle after they were in bed ; deponent every night locked up the music book with deceased's papers in the yellow room, and after deceased was dead, deponent that night locked up the said book and papers, deponent never saw the will till Harris and Draper found it ; deponent offered Harris the key of the drawers in the yellow room, but he refused to take it. The day deceased died, he expressed the greatest affection for producent, and said he would make his will and take special care of her, and amply provide for her ; she shewed great affection to deceased ; a bag of money of deceased's was delivered to Lady Winford, but by her order deponent delivered it to Harris ; she never sent deponent to Harris for money.

18. Respondent knew nothing of Lady Winford's leaving him a legacy till since her death.

15. Elizabeth Wright.—Harris was alone with

deceased the day before he died ; Lady Winford was not with them for a considerable time ; has often heard her say she wished deceased would make his will ; the book the deceased wrote on, was locked up every night ; deceased and Lady Winford lived in great harmony, she behaved very decently on deceased's death ; gives her a very good character ; deponent never saw the will till she heard Harris read it, and then it was cancelled, Sarah Wheeler told deponent she saw an old will of deceased's in the bow-window room.

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18. Int. Respondent has a legacy in Lady Winford's will. 19. Int. William Wright has also a legacy.

N. B. All or most of these witnesses were examined after Lady Winford's death by her executor.

Dr. Hay's argument for Hillier.—The only question is, whether the will was cancelled by the deceased ? We admit there is no positive proof that the deceased cancelled the will, or ordered it to be done ; we could not prove it was not cancelled by deceased without shewing who did cancel it, it is enough for us to shew from circumstances that it was not cancelled by deceased. *Swinb.* part 7. sect. 16. if a will is kept where it may be cancelled by other persons, it is to be judged by circumstances, whether the testator did it or not ; fraud and forgeries must be discovered by circumstances. A cancelled will is not void on course, 2 *Vern.* *Onions* and *Tyrer* (a), a will is good if it be

(a) Thirdly, the Lord Chancellor was of opinion that the former will stood good, for the latter will being void, and not operating as a will, would not amount to a revocation ; and as to the actual cancelling of the former will, the evidence is not full and positive that it was done, &c. &c. *Onions v. Tyrer*, 2 *Vern.* 742.

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cancelled by accident or fraud. It is clear that this will existed in 1748. Deceased had great affection for his son, who will have the whole personal estate under this will. His marriage with Lady Winford did not alter deceased's intention as to his will, as appears by his declaration in June 1748 to Williamson ; his declaration in 1751 to Huntback, points directly to this will. Deceased had no access to the paper for a week before he died. Prerog. and Deleg. *Slade and Burgoyn* against *Dr. Friend*.

Dr. Smalbroke, same side. — Prerog. *Jones and Sir George Champion*. Prerog. (a) *Grace and Calemburg*. Case in chancery of *Sir Thomas Frankland's* will. In all those cases the fraud was proved by circumstances.

Dr. Pinfold, contrà for executor of Lady Winford. — They have undertaken by their plea to prove that the will was uncancelled at deceased's death. A will found in a testator's custody is presumed to be cancelled by himself. Harris was an enemy to Lady Winford, and yet she sent for him on deceased's death, which shews her fairness ; she never went after deceased's death into his study or to his bureaus. No attempt to impeach Tolly's character. Improbable that the deceased should leave this paper on the chest of drawers for Wheeler to peruse. It does not appear the codicil refers to this will, though I admit it does refer to a will. We hope the Court will pronounce against this will with costs.

Dr. Bettesworth, same side.—They must make
(a) *Grace v. Calemburg*, Vol. I. p. 76.

a positive proof of fraud, or at least produce the <sup>PRAELOGATIVE
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I was of opinion there was no proof at all that this will was cancelled by Lady Winford, or her order, and that the character given her by the witnesses in general, destroyed any presumption of her being capable of being guilty of so bad an act. As the paper was very much torn and worn out, and was proved to have been carried from place to place, possibly it might have been cancelled by accident, but supposing it was really cancelled by the deceased himself, the question would then be, whether the deceased had not said and done enough to revive it. In June 1748, he expressly declared this paper (notwithstanding his marriage to Lady Winford) to be his will, for he then spoke of having a will by him, to which Williamson's mother was a witness, but she swears she never was a witness to any will of deceased's but this, consequently his declaration is absolutely confined to this will; his declaration also to Huntback in April 1751, clearly must relate to this will, for he told her he had made good his promise to his dead wife, and had taken care that Harris should not be a trustee for his son; now it appears upon the face of this will that Harris was made a trustee for his son, but his name is struck out, though it is still legible. It is fully proved that the deceased gave directions for drawing the codicil—that he was desirous to complete it, and if he had, it would have made the will complete, by appointing a new executor and guardian to his son, &c. instead of the deceased one named in the will—that he was in possession of the codicil several days before his death—that

PREROGATIVE COURT. it was in his pocket when he died, and as he was capable of reading it, the law would presume he had read it, and in the very beginning of it, it is called a codicil to his will, and confirms his will, and a codicil *ex vi termini* implies a will, there are therefore the strongest declarations from the deceased, that he esteemed this paper to be his will; for it is not pretended there was any other paper to which the codicil could refer: I was therefore of opinion that these declarations, and the orders given by him for making the codicil, would have been sufficient to have revived the will, even if it had been *certain* that the deceased had himself cancelled it, agreeable to the case of *Slade and Burgoyne against Dr. Friend* (a); in that case the will was found locked up in deceased's trunk, of which she kept the key, and it did not appear that any body had access to it but herself, the will was fair and entire, except that lines were drawn over the testatrix's name Elizabeth Hutton, which was held to be a cancellation; but it being proved that she on her death-bed being asked whether she had made a disposition of her affairs, answered "Yes," and said it was in that trunk, pointing to the trunk where it was found, this declaration was held to be a revival of the will, and it was pronounced for both in the Prerog. and the Deleg. I therefore in this present case pronounced the paper propounded, to be the last will of Samuel Hellier Esq. deceased, but did not pronounce that it was uncancelled at the time of his death.

(a) *Slade v. Friend and others*, Deleg. 4th July 1745. The Delegates present at the sentence were — Mr. Justice Wright, Mr. Baron Reynolds, Drs. Strahan, Simpson, Chapman, and Hay.

PREROGATIVE
COURT.EATON *against* BRIGHT and SUNDLAND.

Mary Nonely deceased made her will as suggested, and appointed Bright and Sundland executors, Ann Eaton claimed to be deceased's first cousin and next of kin, the executors denied her interest, she gave in an allegation to propound it, in which she pleaded the marriages of deceased's father and Cother, and of her own father and mother, and that deceased's mother and Eaton's mother were sisters, and always owned each other as such, and that deceased always owned Eaton to be her cousin, and her mother to be her aunt, but did not plead the marriage of their grandfather and grandmother in their common ancestry; it was objected, that the allegation ought not to be received, because the marriage of the common ancestors was not pleaded.

1755.
Hilary Term,
January 22.

In an interest
cause it is not
necessary to
prove the mar-
riage of the
common ances-
tors.

JUDGMENT—SIR GEORGE LEE.

But I held it was not necessary to plead and prove the marriage of the common ancestor; in a case of interest, it was sufficient to prove owning and acknowledging, and common reputation of relationship, and I admitted the allegation.

TAYLOR *against* TAYLOR,

January 22.

The cause had stood upon admission of an allegation given by Alexander for some days; Hughes, the adverse proctor, had taken no care to attend his

An allegation
admitted in per-
son.

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Hilary Term,
January 22.

Per Curiam.

I admitted the allegation *in paenam* of Hughes.

January 22. MOORE, formerly HACKET, *against* HACKET and Others.

A widow propounds her husband's will as executrix.

An allegation pleading the invalidity of her marriage with the testator, rejected.

Dr. Pinfold, for William Hacket. — William Hacket died the 29th May 1754; Mary Moore, formerly Hacket, the deceased's widow, has propounded a will, dated the 27th May, 1754, in which she is executrix, William Hacket, deceased's son by a former wife, opposes the will: he now offers an allegation, consisting of two parts, First, he pleads that the deceased's marriage to Moore was only *de facto*, for that she was really the wife of another man when she married the deceased, and that her first husband was living long after: Secondly, the allegation pleaded that the deceased was not in his senses, before, at, and after the time of the date of the will, and that it was made by Smith, a witness to it, from the dictation of the widow, and that the deceased gave no instructions.

Per Curiam.

I rejected all that part of the allegation which related to the marriages, but admitted all that related to the will.

FLORANCE against FLORANCE and FLORANCE.

January 22.

Dr. Smalbroke for the executors.—Christopher Florance, yeoman, deceased, made his will, dated the 21st July, 1753, appointed his father and brother executors, the deceased had a palsy, and therefore signed only the initial letters of his name to the will, he left a widow, and a child eight months old, to whom he has given legacies; deceased owed his father 400*l.* by bond, he has left him a legacy; the widow opposes the will; full proof of sanity and execution.

The equity on
statute of W. S.
cannot be ex-
tended beyond
the wills of
mariners.

Dr. Hay, for the widow.—One of the witnesses swears she believes the will was made to secure a debt to the father, the effects amount only to 679*l.* 3*s.* 6*d.*, debt to the father, 400*l.*, the estate will not answer the debts and legacies. The deceased, therefore, who had a palsy, did not know the state of his affairs. I admit there is proof of execution and sanity, but the witnesses differ in circumstances, where they had not been instructed. The will ought to be set aside, because it has been made to secure a debt; the widow has interrogated the witnesses, but has not pleaded.

Witnesses for the Executors.

1. Elizabeth Tupper.—In July, 1753, deceased (who lived at about four miles distance,) called at deponent's husband's house; deponent, as she went backwards and forwards, heard deceased give deponent's husband instructions for his will; deponent's husband drew it, and read it to deceased in deponent's presence; deceased approved and exe-

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—
Hilary Term,
January 22.

cuted it in presence of deponent and her husband, and of Eleanor Libbard ; and deceased then said, his having a child born was the reason of his making a new will ; deceased was perfectly in his senses.

3. Int. Deceased had a slight palsy, but was perfectly in his senses. 5. Int. Deceased said he had done well for his wife. 6. Int. Respondent did not exactly hear all the instructions. 10. Int. Believes deceased knew the whole contents of the will. 15. Int. Believes he executed a bond to his father at the same time ; believes the will was made to secure a debt to his father.

2. Eleanor Libbard.—The will was executed by deceased 'in deponent's presence, and of Tupper and his wife ; he was perfectly in his senses, and thanked deponent for being a witness ; deponent was a stranger to deceased.

7. Int. Deceased could be understood very well. 9. Int. None but the witnesses were present at the execution of the will. 11. Int. Deceased said his hand shook. Int. 12. Deceased executed a bond at the same time, to which deponent was a witness. 15. Int. The bond was executed immediately after the will.

3. Roger Tupper.—Deponent knew deceased ; on 27th June 1753, deceased told deponent he would alter his will, because he had a child born ; says he then gave him his old will, and instructions by word of mouth for a new will ; deponent drew a new will from the said old one and the said instructions ; deponent read the said new will to deceased in presence of deponent's wife ; he approved and executed it in presence of deponent and his said wife and of Eleanor Libbard ; deceased was perfectly in his senses.

5. Int. Deceased had a child eight months old.
9. Int. Believes the will was executed in the afternoon ; deceased's father and respondent's son were present when it was executed. 12. Int. Deceased executed a bond at the same time. 13. Int. Deceased was fully in his senses. 15. Int. The bond was executed immediately after the will ; does not know that the will was made to secure a debt to the father.

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—
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Dr. Hay, argued that this will ought to be set aside, because it was made to secure a debt, and came within the reason of the statute of W. 3. the equity of which extended to the wills of other persons as well as to the wills of mariners.

JUDGMENT — SIR GEORGE LEE.

But I was of opinion, first, that there was not proof that this will was made to secure a debt ; there was no other evidence of the fact but what Elizabeth Tupper says to the 15. Int. "That she believes the will was made to secure a debt." And secondly, I was of opinion that the equity of the Statute of W. 3. never had been, and ought not to be, extended further than to the wills of mariners ; the legislature had only in view to put a stop to the gross practice of landlords in drawing in seamen to make their wills, under pretence of securing an alehouse debt, to give them all their effects in prejudice to their wives, families, and relations, and therefore in that case the Statute had been construed liberally to extend beyond the letter to prevent that mischief, but on the other hand there would be great mischief in extending it to the wills of all persons whatsoever, for then no

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man could make safely his creditor his executor, and therefore as the deceased's capacity and due execution were fully proved, I pronounced for the will.

ARCHESES COURT OF CANTERBURY.

February 4.

HOLMES *against* HOLMES.

**In a suit for the
restitution of
conjugal rights,
the wife having
a separate pro-
perty of her own
is liable to pay
her own costs.**

Dr. Bettesworth, for Sarah Holmes.—Francis Holmes brought a suit in the Consistory of London, against his wife Sarah Holmes, for restitution of conjugal rights; the marriage was confessed, and she pleaded in bar, that she left him because he used her cruelly, and she could not safely live with him; the Chancellor admitted her allegation, from which the husband appealed to the Arches; no alimony or costs were settled in the Court below, or prayed; but we now make the usual motion, that the husband may be condemned in costs for carrying on the suit; the husband opposes this, and his proctor, in his act, says, that the wife ought to pay alimony and costs to the husband, because she has a separate estate of above 300*l.* a-year, and he is a bankrupt, and is worth nothing.

Dr. Collier, for the husband.—Mr. Holmes has made affidavit that he is worth nothing, and that she has a separate estate, and she in her affidavit does not deny those facts; he borrowed 2000*l.* of her money of her trustees, and they at her instigation took out a commission of bankruptcy against him, by which he is ruined.

Dr. Hay, same side.—Though we have prayed it in the act, we do not insist to have alimony or costs from the wife, but we insist that we ought not in this case to pay her costs; he has sworn he is not worth twenty shillings of his own; he has not prayed to be admitted a pauper, because his wife has an estate, of which, by intendment of law he has the benefit, and therefore, he cannot take the oath of a pauper.

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—
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Dr. Bettesworth, for the wife, said, that since he was not admitted a pauper, by the law and course of the Court, he was obliged to pay her costs.

The affidavits of both parties were read.

He swore, that with her consent, her trustees lent him 2000*l.* of her money, (which by settlement was secured for her private use before marriage), that she, finding his affairs grew bad, persuaded her trustees to take out a commission of bankruptcy against him, by which he was utterly ruined, was now quite out of business, and was not worth twenty shillings; that she had a separate estate to her own use of 300*l.* a-year, 2000*l.* in money, and plate to the value of 500*l.* In her affidavit, she admitted said facts, only that her real estate, after the outgoings were paid, did not amount to 300*l.* a-year.

JUDGMENT — SIR GEORGE LEE.

Under the circumstances of this case I was clearly of opinion the husband ought not to pay the wife's costs; in the general course the husband pays costs, because he is supposed to have a fortune, and the wife nothing but what she had from him; but here the case was directly the reverse; I therefore rejected her petition, and mentioned the

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February 4.

case of *Turst and Turst (a)*, in the Delegates, which was a much stronger case than this, for Mr. Turst was one of the king's band of Gentlemen Pen-

(a) *Turst v. Turst*, Deleg. 27th January 1740. The Judges Delegate present at the sentence were, Mr. Justice Page, Mr. Baron Carter, Dr. Kinaston, Dr. Walker, Dr. Pinfold, jun., Dr. Chapman, and Dr. Collier.

The sentence, as recorded in the Assignation Book of the Court, is as follows: Holman prayed the Judges to pronounce for the force and validity of the appeal and complaint interposed in this cause, on behalf of his client, the said Thomas Sebastian Turst, Esq., and that the same was made and interposed for good and sufficient reasons, and for their own jurisdiction; and that the pretended definitive sentence in writing made and promulgated by the Dean of the Arches, the Judge, from whom, and every thing therein, pronounced, decreed, and declared, be entirely and absolutely revoked, and declared null and void to all intents and purposes in law whatsoever; and that the interlocutory order or decree heretofore made and interposed by the surrogate to the Chancellor of London, the Judge in the first instance of this cause, and from which the appeal to the Court of Arches was brought by Cheslyn's said client, be ratified and confirmed in all things. Cheslyn prayed Holman's petition to be rejected, and that the money, bank notes, lottery tickets, clothes, jewels, and other things forcibly taken away from his client, and mentioned and set forth in the schedule annexed to an affidavit, dated 3d May 1739, made by his party in this cause, be restored; that Holman's client be condemned in the costs of suit, and alimony. The judges having heard the advocates, counsel, and proctors, on both sides, by their final interlocutory decree, having the force and validity of a sentence, did pronounce, decree, and declare for the appeal in this behalf interposed, and their jurisdiction, or rather for that of our sovereign Lord the King; and reversed the sentence of the Judge of the Arches Court of Canterbury, from whom this cause is appealed, and confirmed the decree of the Judge of the Consistory Court of London, and retained the principal cause, and decreed a compulsory, at the petition of Cheslyn.

This case (of *Turst v. Turst*) is erroneously cited in Dr. Haggard's report of Sir William Wynne's judgment in *Davis v. Davis*, Arches, 1789, under the name of *Pearce v. Pearte*.

See also on this subject *Wilson v. Wilson*, Consistory of London, 1797, 2 Hagg. 203; and *Davis v. Davis*, Arches, 1789, (in which the case of *Holmes v. Holmes* is especially referred to), notes, *ibid.*

sioners, and had a salary of 100*l.* a-year ; but it appearing that the wife had a separate income of much greater value, the Delegates would not allow her either alimony or costs (a), and reversed Dr. Bettsworth's decree, by which he allowed her costs.

ARCHES
COURT.
—
Hilary Term,
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DEARLE and DEARLE *against* SOUTHWELL. February 4.

Appeal from Litchfield.

Dr. Smalbroke, for Southwell.—This is a motion to invoke proceedings : John Dearle of the parish of St. Mary in Stafford took out citation on 22d July 1749, to obtain a faculty for two pews in that church. On return of the citation, John Southwell appeared and alleged his claim to one of the pews ; pleas were given in, and witnesses examined on both sides. On hearing the cause, the Court decreed a faculty to John Southwell, (who is the master of the Free School at Stafford,) provisionally, that if the parishioners did not interpose, he should have a faculty for the seat he claimed. This decree was made because South-

Application for
proceedings to
be invoked
from another
cause, rejected.

(a) A question of this description was raised and discussed in the case of *The Marquis v. The Marchioness of Westmeath*, Dec. 1827. The estates of the Marquis were considerable, but much encumbered ; he had however an income much greater than the separate income of the Marchioness, which was derived from several sources. No application for alimony or costs had been made in the Courts below, i.e. in the Consistory of London, or the Arches Court. In the Court of Delegates three bills of costs were brought in, and the proctor for the Marchioness prayed to be heard on taxation. An act on petition was gone into, and the Court finally acceded to the prayer of the Marchioness, so far only as regarded the costs in the High Court of Delegates, but it was generally understood that the Judges were much divided in opinion on the subject.

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well only intervened for his interest ; he accordingly took process, then the same John Dearle and Ann his sister (who is only an inmate) appeared and opposed. Their proctor gave in an allegation in the name of Ann Dearle only. On 21st May 1754 Southwell's proctor alleged the former proceedings, and prayed the allegation to be rejected. The Court rejected the allegation, and decreed the faculty absolutely to Southwell. John Dearle on the first sentence appealed, but by his appearing to oppose the faculty to Southwell, he has preempted his appeal. The present appeal is from rejecting the said allegation on 18th June 1754, and decreeing the faculty to Southwell. We prayed that the proceedings in the cause between John Dearle and John Southwell may be invoked.

Dr. Simpson, for John Dearle and Ann Dearle.—The appeal is from a grievance, and must be heard *ex iisdem actis*; the present is an original cause distinct from that of *Dearle* against *Southwell*. On 26th March 1754, first sentence given ; on 23d April 1754 Southwell prayed his citation with intimation to appropriate the pew in question. Citation returned on 7th May 1754. John and Ann Dearle appeared, and alleged they had interest in that pew, and prayed time to set it forth : the decree in the first cause was, that John Dearle had no right to the pew he prayed a faculty for, and the judge declared that Southwell had a better right in the present cause. We gave an allegation for Ann Dearle, which the judge rejected, and decreed a faculty to Southwell. The only question is, whether the proceedings on the former cause shall be invoked ?

Act in the Arches upon this motion read.
Alleges that the proceedings in the first cause are part of this, because the judge in that cause ordered the citation for this cause to be taken out.

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Act below on 23d April 1754 read.
Southwell's proctor prayed citation with intimation, the judge decreed it.

Dr. Smalbroke, for Southwell. — The same point was under consideration in the former cause ; both parties must examine again upon the same point after publication, which creates danger of perjury. Dearle claims a family right in this pew. Ann Dearle has a right to have these proceedings invoked.

Dr. Simpson, contrà. — Proceedings cannot be invoked, but when the cause is between the same parties, or on the same point : in Chancery if an executor pleads *plene administravit* against a legatee, and assets are proved, and afterwards the executor pleads *plene administravit* against another legatee, the last legatee may invoke the former proceedings, because the point has been determined before against the executor.

JUDGMENT — SIR GEORGE LEE.

I was of opinion that this cause, in which Southwell prays a faculty, is quite distinct from that in which Dearle prayed a faculty : if Southwell's counsel thought the causes were one and the same, they ought to have prayed a monition *pro omissis*, and not an invocation of proceedings, for that *ex iure termini* implies distinct causes. I said the judge's decree on 26th March 1754 was a strange one, for he

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decreed a faculty to Southwell, and at the same time decreed he should not have it, unless the parishioners would not oppose it : he did not decree a citation on that day, for that was decreed upon a motion on 23d April 1754. Southwell could not have a faculty in the first cause, for he appeared only to oppose one being granted to Dearle, in the same manner as Dearle now opposes one being granted to Southwell ; perhaps neither ought to have a faculty, and yet both may have an interest to oppose each other. The points in the two causes are distinct, and therefore the proceedings ought not to be invocated ; they cannot be evidence against Ann Dearle, who was no party in the first suit. I was of opinion that the proceedings in the former cause ought not to be invocated, and rejected Southwell's petition.

February 4.

LODER against LETSOME.

Original minutes
of a cause di-
rected to be
transmitted to
the Court of
Arches.

Mr. Letsome, vicar of Thame, in Oxfordshire, cited Mathew Loder, surgeon of that town, to answer (before the commissary of the dean and chapter of Lincoln, within whose peculiar jurisdiction Thame lies) to articles for making a vault in the church for burials, without a faculty ; Loder was excommunicated below for not appearing, although he was not, as alleged, assigned to appear, from which he has appealed ; he employed one Mr. Prickett to apply to Mr. Bell, the registrar, for a copy of the minutes, Bell delivered him a copy of the minutes attested by himself, as registrar ; the process transmitted differs essentially from those

minutes which are brought into this Court, with an affidavit of Prickett, that they are the same he received from Bell.

Loder's counsel moved that Bell, the registrar below, might be admonished to transmit the original minutes on oath, which I decreed accordingly.

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PREROGATIVE COURT OF CANTERBURY.

PHILLIPS *against* ALCOCK.

February 6.

Dr. Simpson, for Phillips.—Phillips is one of the executors of Mrs. Ann Alcock, deceased ; before her marriage with Arthur Alcock, she had a fortune of 2,500*l.*, and by settlement 1000*l.* thereof was vested in trustees, for her sole use, and at her disposal by will, &c. 20th December, 1753, she made her will, pursuant to her power, and died the 5th March 1754 ; her husband, Arthur Alcock, took administration to her as dying intestate ; Phillips called him to bring in the administration, and shew cause why an administration limited to the will should not be granted to him. Alcock appeared, brought in the administration and opposed the will ; he was then assigned to bring in scripts and scrolls, was excommunicated for not doing it ; he then appeared and brought in a will made in January, 1754, and swore he knew of no other will ; there being now two wills before the Court, it appears that the husband obtained administration upon a false suggestion that his wife was dead.

A husband obtains administration to his wife as dead intestate. Two wills afterwards produced. Court will not revoke the administration till one of the wills are proved to be good in law.

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February 6.

intestate ; and, therefore, Phillips prays that the Court will revoke his administration.

Per Curiam.

But as the husband had not admitted either of the wills to be good. I refused to revoke the administration granted to him, till a will of deceased's should be proved in due form of law.

February 4.

DEARDSLEY *against* FLEMING.

The will of the cooper of an Indiaman does not fall within the provisions of Will. 3. c. ; it was neither embodied in a power of attorney, nor made to secure a debt.

Dr. Simpson, for Fleming.—William Reed, mariner, a bachelor, deceased, made a will, dated the 12th December 1752, and appointed his mother's husband, by the description of his loving friend James Deardsley, of East Greenwich, executor and universal legatee ; he afterwards made another, dated the 15th January 1753, and appointed his loving friend, Mrs. Ann Fleming, executrix and universal legatee. Deceased was cooper of the Monmouth East-Indiaman, and courted Ann Fleming in way of marriage, who was daughter-in-law to John Moore, a witness, and lived with him ; both wills were opposed and propounded. We do not now object to the first will, because my client is executrix in a latter will ; one Osborne, a pensioner in Greenwich Hospital, but who had been a schoolmaster at sea, was employed to make the last will, and he, from verbal instructions given him by deceased, filled up the blanks in a printed will, deceased approved of it, and executed it, but at the time of the execution it was attested only by Moore ; William Hornby, the other sub-

scribing witness to it, attested it at a different time, which is the only objection to it.

PREROGATIVE COURT.

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February 4.

Dr. Bettesworth, for Deardsley.—Deceased was a bachelor, Deardsley married his mother; last will executed when he was not quite sober; it was drawn by Osborne, a pensioner of Greenwich Hospital, who has not attested it; a letter of attorney to Fleming was executed at the same time, which by construction of stat. W. 3. destroys the will.

N. B. The will of the 12th December, 1752, was fully proved by two of the subscribing witnesses.

Witnesses for Fleming.

1. *Jonathan Osborne*.—To the last will dated the 15th January 1753; says he well knew deceased; in the evening of the said 15th January, John Moore sent for deponent to come to his house; deponent went, and then found Moore and deceased together; deceased then said to deponent he wanted to have a will and power made to Ann Fleming, who deponent understood deceased courted, and at the same time, he said he would give her every thing he had, and wished it was more; a blank will being sent for, deponent filled it up from deceased's verbal instructions; proves identity of the will; deponent read it to deceased, who approved, signed, sealed, and published it, in presence of deponent and John Moore, Moore signed it as a witness, and deponent would have signed it, but deceased would not let him, saying, deponent was not an housekeeper; deceased was then of sound mind, &c.; William Hornby, whose

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name is now subscribed as a witness to said will, was not present at the execution ; deceased executed a letter of attorney at the same time.

2. John Moore.—Deponent well knew deceased from deceased's infancy ; deceased courted Ann Fleming, deponent's daughter-in-law, and often came to her at deponent's house, and frequently declared in deponent's presence his intention of marrying her, and that when he went to sea he would leave her his will and power, and frequently desired deponent to get somebody to make his will for him, in favour of said Ann : on the 15th January, 1753, deceased, at deponent's house, desired deponent to get somebody to make his will for him ; deponent then sent for Osborne, deceased gave him verbal instructions, and pursuant thereto Osborne filled up the blanks of a printed will, and Osborne read it twice to deceased, and deceased read it himself, and then he approved and executed it in presence of deponent and Osborne ; deponent attested it then, but Hornby was not present, but deceased said he would go and get Mr. Hornby's name to it ; deponent did not see Mr. Hornby sign it ; deceased was of sound mind, &c.

1. Int. The will was executed about three in the afternoon ; deceased was sober, deponent and his wife, and producent and Osborne were present.

3. William Hornby Smith.—Deponent well knew deceased from his infancy ; deceased, in January 1753, came to deponent's house, and brought a paper, signed with deceased's name, and a seal to it, and attested by John Moore, and told deponent it was his will, and desired deponent would witness the same ; deponent did not see the body of the will, for it was folded down, but

deponent, at deceased's desire, did set his name as a witness to said paper, but deponent did not see deceased execute it, but deceased told deponent it was his will; proves identity of the paper; believes deceased was not quite sober, but was in liquor when he brought the will to deponent, and deponent signed it.

PREROGATIVE COURT.
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February 4.

JUDGMENT—SIR GEORGE LEE.

I was clearly of opinion this case did not come by any construction within the statute of King William; the will was not embodied in the letter of attorney, nor was it made to secure a debt, but was made from affection to the executrix, and it was no objection to a will that a letter of attorney was executed at the same time. With respect to the proof of this will, there was evidence of declarations previous, of instructions, of approbation, execution by deceased in presence of two witnesses, capacity, and a recognition to Hornby. I therefore pronounced for the last will.

ARCHES COURT OF CANTERBURY.

FLEET, formerly KINGSTON, *against* HOLMES,
formerly KINGSTON.

Hilary Term,
February 18.

Dr. Paul for Fleet. — Samuel Kingston, Esq. made his will on the 11th January 1735; appointed his wife Mary, now Holmes, executrix; gave a

In a suit for the recovery of a legacy, an inventory refused, because the executrix had, in her answers, allowed there were assets sufficient to pay the legacy, and the costs of the suit.

allowable there were assets sufficient to pay the legacy, and the costs of the suit.

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legacy to his daughter (who is now married to Mr. Fleet) of 1000*l.* to be paid at her age of twenty-one years. She was but four years old at the death of her father. Deceased's personal estate was upwards of 6000*l.* We have brought a suit for this legacy, and in our libel pray interest from the death of the testator. They have tendered the 1000*l.* and 60*l.* for interest, from the time the legatee came to age. We now pray an inventory, that we may know what the estate consisted of, and what interest was made.

Dr. Hay, contra, for Holmes. — The executrix has in her answers acknowledged above 6000*l.* assets, and that she has made interest of the money. We have tendered the principal legacy with costs, if any are due by law, and interest from the time the legatee came of age, her confession of assets in this cause will bind her. The mother has maintained her, and therefore she has no right to interest. Where a legacy is payable at a certain time, interest is not due, as may be inferred from 2 Salk. 415. *Snell* and *Dee* (a). The book says, when no certain time is limited for paying a legacy, it shall carry interest from a year after the testator's death; *ergo*, if a time is limited, interest shall not be paid. Chanc. Cases, 264. *Bullen* and *Allen*, to the same purpose.

JUDGMENT — SIR GEORGE LEE.

I refused to decree an inventory, because I thought it useless, for the executrix would certainly be bound in this suit by her confession of assets, and of having made interest in her answers

to the libel for this legacy, and therefore Fleet was already sufficiently founded to have the judgment of the Court whether she ought to have interest or not.

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COURT.

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WARE, otherwise TANK, *against* JOHNSON.

February 13.

Dr. Paul, for Johnson.—Edward Johnson brought a suit in the Commissary Court of Buckinghamshire, against Joseph Ware, *alias* Tank, of Chesham, for defamation. The words of the defamation were in writing. Ware went to a public house in Chesham, where both he and Johnson live, and wrote these words, and signed his name to the paper: “I do hereby certify that Edward Johnson keeps a whore in his house.” This paper, marked A. was pleaded and annexed to the libel, and witnesses examined thereon. Ware gave in an allegation, in which he owned that he wrote said paper, but did not do it with intention to defame Johnson, and further pleaded that Johnson had been free with several women; he did not examine on this plea. Sentence given in the Consistory Court for the defamation. Ware appealed, and after sentence he came to the register’s office at Aylesbury, to see, and did see, the libel to which said paper was annexed, and from that time said paper has been missing.

Not material whether defamation is in writing, or by parol. Nullities are unfavourable, where they tend to obstruct justice upon matters of form only.

Dr. Hay, for Ware.—Informations were laid before a surrogate, but the sentence runs in the name of the judge, and is therefore null.

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Evidence read for Johnson.

2nd article of the libel.—Ware, at Chesham, in 1752, did defame Edward Johnson, and charged him with fornication, by writing a paper in these words, “I do hereby certify, that Edward Johnson keeps a whore in his house.”

Affidavit by Mr. Bell, the registrar, and his clerk.

That said paper was lost or stolen out of the office, as they believe by Ware, for he came to inspect the libel to which said paper was annexed, and said paper has been missing ever since.

Witnesses.

1. Joseph Freeman.—Deponent saw Ware write and sign said paper marked A., and he declared the same as he wrote.
2. Charles Preston.—Sweats he heard Ware say Johnson kept a whore in his house, and he owned he wrote said paper, which then lay on the table.

Ware's allegation, dated the 10th May, 1753.

Confesses writing said paper, but did not do it with intent to defame Johnson; alleges that Johnson has been free with women.

For Ware, read.

The sentence, which runs in the name of Dr. Bettesworth, the judge, but is signed by his surrogate, Mr. Stevens.

Dr. Hay, for Ware. — Two witnesses necessary to prove defamation, must depose to a certain time;

identity of Ware sworn to by Freeman, but identity of Johnson not proved ; the words are not actionable, because Johnson is liable to an action at law for keeping a whore in his house ; the sentence is null, because it runs in the judge's name, when the cause was heard by his surrogate, in the Arches, on 11th August, 1731. In *Bull* against *Paine*, the objection was, that the sentence in that cause ran in the beginning and end in the name of the surrogate, but the decretory part was in the name of the chancellor of Peterborough, Dr. Bettesworth held the sentence was null, and set aside the proceedings.

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COURT.

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JUDGMENT — SIR GEORGE LEE.

I was of opinion that the defamation was fully proved by two witnesses ; that it was not material whether the defamation was in writing or by parol ; that these words were clearly defamatory, and were not actionable at law ; for it was not said he kept a bawdy-house, which is a nuisance, and punishable at law, but that he kept a whore, which might give offence, but is not considered in law as a public nuisance.

As to the sentence, I observed that it was said at the bottom, that it was given by Mr. Stevens, the surrogate, though it run in the name of the judge ; and by the minutes of the Court it appeared that the cause was heard by Stevens, who read the sentence ; that therefore, the substance of justice was preserved, and the error was only in matter of form ; that nullities were unfavourable, when they tended to obstruct justice upon matters of form only ; that the case cited was a strong one, but I thought went

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too far, for the sentence only could be null, but would not destroy all the rest of the proceedings antecedent to that nullity.

I therefore by interlocutory remitted this cause, but gave no costs, on account of the irregularity of the sentence.

PREROGATIVE COURT OF CANTERBURY.

Hilary Term,
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REPINGTON *against* HOLLAND and REPINGTON.

A letter held to
be testamentary.

Dr. Hay, for Ann Repington.—James Repington, the deceased, left a widow, Ann Repington my client his mother, three brothers, and a sister. In August 1751, he went to the East Indies, as officer in the land service of the East India Company. (a) 20th February 1753, he wrote a letter to his mother, wherein he said, “*I have been very successful; and it is now in my power to do what I always desired, that is, to enable you to live comfortably the remainder of your life. As we have been in continual war here I have made my will, so that if any misfortune should happen to me, besides the one-half of my fortune, which you know who has a right to, I leave you the other, except a few legacies to my brothers and sister,*

(a) When he died it appeared that he was captain in a troop of dragoons.

whom I insist on your taking to live with you." PREROGATIVE COURT.
She received this letter by the post at Chester, where she lived in September 1753. In October 1753, the deceased died, abroad. In October 1754, John Holland, alleging himself to be an executor with the deceased's widow of a will made before the deceased left England, viz. on 15th December 1749, took probate thereof, power being reserved to the deceased's widow. The mother did not hear of the deceased's death till after probate was taken of the said will; the mother has brought the said letter into court with affidavits to prove the deceased's handwriting and the receipt thereof, and has taken out a citation against the said Holland and the widow as executors, to bring in the said probate, and to shew cause why it should not be revoked, and why administration, with the letter annexed, should not be granted to her until the original will, or an authentic copy, is brought in. The executors have appeared under protestation, and deny that the said letter has any force or validity in law; the wife is universal legatee in the said will, but at the time of making it the deceased had nothing to leave.

Dr. Pinfold, for the executors.—The question is, whether the protest is justifiable. It does not appear what the deceased was worth when the will was made.

Dr. Hay.—We insist that the will, dated 15th December 1749, is revoked. The deceased in the said letter expressly says, "I have made my will," which must be in the Indies. This subsequent will is a revocation of the former, as it is incon-

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PREROGATIVE COURT. sistent with the first, so held in the case of Hel-
lier (a).

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Dr. Pinfold, contra.—The question is, whether the mother has shewn a sufficient interest to be entitled to the effect of her process. The deceased did not intend this letter should operate as a will; the latter will may have an executor, and then the mother cannot have administration. Several ships have come from India since his death. The process is not proper; it should have been to cite the wife to accept or refuse the administration, &c.

Per Curiam.

I was of opinion the letter alone was clearly testamentary, (b) and would revoke the first will, though the latter will which the deceased declared under his hand that he had made, should have been produced.

I therefore assigned Mr. Bateman, proctor for Holland, to appear absolutely, and revoked the probate already granted, and assigned to hear on the by-day of this term, on the grant of the administration with the letter annexed, limited till the will, or an authentic copy thereof, should appear.

(a) Vol. I. p. 472.

(b) *Denny v. Barton and Rashleigh*, 2 Phill. 575.

PREROGATIVE
COURT.**GOODMAN against GOODMAN and Others.**Hilary Term,
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Dr. Simpson, for Sarah Goodman. — Joseph Goodman, Esq. died the 1st of March 1754, a widower, left Sarah Goodman, his sister, and Ann Lacy, another sister, and William and Thomas Goodman, his brothers, and John Johnson, Dorothy Sexton, and Elizabeth Yemans, his nephew and nieces. Sarah Goodman is appointed executrix and residuary legatee in a testamentary schedule made the 1st of March 1754, the day he died; a probate of this schedule was granted to her on affidavits, afterwards Sarah took out a decree against all the next of kin to see it proved by witnesses. Thomas Goodman and Dorothy Sexton, by proxy, declared they would not oppose the schedule, and Mrs. Hall, the only legatee in a former will, who survived the testator, except the said Sarah Goodman, who declared she would not oppose it. The rest of the persons entitled to distribution, except William Goodman, have not appeared, and the said William Goodman, the deceased's brother, alone opposes the schedule; he pleaded the deceased's affection to Sarah, and that he had executed a will in 1740, in his daughter's life-time, in which Sarah was executrix, and had a legacy of 500 $\text{l}.$, and a legacy was also left to Mrs. Hall, and the residue he gave to his three daughters. William Goodman gave in an allegation to propound the will of 1740, but as he was not named in, nor had any interest under it, the Court was of opinion he could not propound it, and rejected his plea. The deceased's daughter died before him, and his wife had been dead

Instructions established as a will, it being clear that the deceased was prevented by death from executing a will directed to be drawn up in pursuance to such instructions.

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twenty years before his death, and his sister Sarah lived with him and took care of his affairs from that time. The deceased had a dropsy for some years, but was sensible to his death. On 28th February 1754, he sent for Mr. Clare, an attorney, to come to him, but he was not at home. The deceased sent for him again at eight in the morning of the 1st of March; he went to the deceased about nine, and the deceased then told him he sent for him to give him instructions for his will. The deceased gave him instructions for part of his will, and when he had wrote them down, he bid him go away and come again at two o'clock that afternoon. About one o'clock he again sent for Clare, he then went and took further instructions, and the deceased ordered him to come again the next morning, but before he was out of the house the deceased recalled him, and he then finished the instructions; Clare then read them over to the deceased in the presence of the said Sarah Goodman and two other persons; the deceased approved them, and directed Clare to prepare a will from them for execution. Clare went home, and while the will was engrossing, the deceased was impatient, and sent twice to Clare to hasten him, but before the engrossment was finished the deceased died. By the instructions, the residue of his estate, real as well as personal, is given to Sarah. On 28th February, the deceased told his apothecary he had sent for Clare to make his will, and expressed great regard for Sarah. Another witness proves the like declaration on the morning of the 1st of March, and the deceased then said he was sorry he had not made his will sooner. There is full proof of capacity.

Dr. Paul, for William Goodman.—The deceased died the 1st March, 1754, he had several relatives; the deceased had made his will 29th February, 1740, duly executed; the deceased left a real estate of 500*l.* a-year, and 10,000*l.* in money, he put off finishing the instructions, and they had not been finished but from the importunity of Neave; interlineations were added to the instructions by Clare, without the deceased's orders, and they were not read to him; he died as soon as the instructions were given; they do not contain the deceased's whole will; real as well as personal estate devised.

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Witnesses for Sarah Goodman.

1. William Thompson, apothecary.—Deponent well knew deceased many years; he died the 1st March, 1754; Sarah is his sister; the deceased was a widower, Sarah lived with him, and she appeared to have the care of his household affairs; believes the deceased had great affection for her; deponent was often with them; deceased expressed great regard for her; his daughter died before him; proves the deceased's name signed to the will made in 1740, wherein Sarah is executrix, to be the deceased's handwriting; deceased had a dropsy and jaundice. In the afternoon of the 28th February 1754, deceased declared to deponent he intended to make his will; next day, deponent asked him if he had made his will, he said "No," but he had sent for Mr. Clare to make it, and then expressed a particular regard to Sarah; deceased died about three that afternoon; he was sensible to within three minutes of his death.

14. Int. Deponent was present when the will of 1740 was found.

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2. Edward Neave, soapmaker.—Deponent well knew deceased ; Sarah lived with deceased from his wife's death to his own, and managed his affairs ; great affection between deceased and Sarah ; deceased's daughter died before him ; proves the subscription to the will of 1740 to be the deceased's handwriting ; believes the deceased died of a dropsy, Clare sometimes did business for the deceased, on the morning of the 28th February, 1754, deceased told deponent he would send for Clare to make his will ; the next morning, deceased told deponent he had sent for Clare and expected him soon ; and afterwards that morning deceased told deponent he had given Clare some instructions ; at one o'clock that day, deceased gave further instructions, but did not finish them ; deponent advised deceased to finish, whereupon he sent for Clare back, and gave him full instructions, and then Clare read them to deceased, in the presence of deponent and two other witnesses ; the deceased was at that time of sound mind, &c. ; deceased declared he intended to release Mrs. Hall's children, as well as herself from what she owed him, which deponent believes was the cause of the interlineations between the 14th and 16th lines, which were not read over to the deceased, and some few explanatory interlineations were afterwards made by Clare.

9. Int. Deceased approved the instructions, and ordered a will to be prepared from them for execution. Respondent does not remember the very words deceased used. 16. Believes deceased was worth about 4000 or 5000*l.*

3. James Clare, gent.—Deponent well knew deceased ; was often employed by him as his attorney ; deponent being informed that the deceased had

sent for him, on the 28th February deponent went to his house that night, but did not see him, but was desired to come again the next morning, deponent was again sent for the next morning, deponent went, and deceased told him he sent for him to make his will ; deponent then took part of the instructions marked A., and then deceased desired him to come again at two ; about one, deceased sent for deponent again, and gave him further instructions, and then appointed deponent to come again the next morning, and said he would talk with his clerk in the mean time ; deponent went down stairs, but was soon called back, and deponent then finished the instructions, and then deponent read all the instructions as they now appear in schedule A. to the deceased, (except some words he mentioned, which deponent afterwards interlined, as more full instructions for deponent's clerk to draw the will, and which were agreeable to deceased's intentions) ; deceased approved the instructions, and bid deponent prepare a will from them for execution : deceased was of sound mind, &c., the interlineations are agreeable to the deceased's declared intention ; it was between one and two when deponent went home, but deceased was dead before the will was finished.

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3. Int. Respondent can positively swear that the deceased ordered deponent to give all the residue of his estate real and personal to Sarah. 5. Int. Nobody was present at writing the first part of instructions ; deceased said he had made a former will, but he would make another as his daughter was dead. 8. Int. Deceased approved the schedule, and bid respondent prepare a will from it.

4. Thomas Bampfield, gent. — Confirms his master, Clare's deposition.

5. Peter Earnshaw. — Deponent was clerk to deceased for thirteen years, and to his death ; Sarah lived all that time with deceased, and managed his affairs ; great affection between deceased and Sarah ; deceased made a will in 1740 ; Sarah executrix ; mentions contents ; deceased of sound mind ; on the 28th February, 1754, deceased sent for Clare that night about a quarter before two ; on the 1st March, 1754, deponent came home, and was told deceased had asked for him several times ; deponent went up to deceased, and he was then very sensible ; Clare was just gone from him ; deceased died very soon after, viz. about three o'clock.

1. Int. Respondent never heard deceased had much affection for his brother William. 5. Int. Deceased had freehold and leasehold estates to the amount of upwards of 500*l.* a year. 8. Int. Respondent has received the legacy the deceased left him.

6. Daniel Thomas. — To 1. Int. believes deceased had a brotherly love for William, and he took his son George into his counting-house, but he was displeased with his behaviour, and talked of sending him home again.

The schedule read.

Dr. Simpson for Sarah. — Nobody claims an interest under the will of 1740. No question as to capacity, nor as to the instructions given by the deceased. He was prevented merely by death from executing the will prepared from those instructions. Prerog. 1749, *Duke of Roxborough v. Macklean*. Deleg. *Watkinson v. Wosey*, (a)

(a) *Watkinson v. Wosey*, 24th Nov. 1738, an appeal from the Prerogative Court of York. The Judges Delegates present at

will for real and personal estate established under the same circumstances as this schedule stands.

Deleg. 1751, *Beaumont v. Sharpe*, (a) the same. *Sellars v. Garnett* (b), Anderson, 38; Dyer, 72. notes were held a good will for lands before the statute of frauds, when the testator died before the will could be finished from those notes.

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Dr. Pinfold, same side.—Will of 1740 not pro-
pounded by any one. Deceased's intentions clear.

Dr. Hay, same side. — An unexecuted paper is a good will, if the testator's intention is permanent. If real and personal estates are devised to different persons, and the will cannot operate as to the real, so that the devisee of the real estate is left without provision, contrary to the testator's intention, it shall not be a good will for either. Prerog. case of *Barrow v. Cox*. But in the present case both the real and personal estate are given to Sarah, and it would be strange doctrine to say she shall not have one, because by law she cannot take both under this paper.

Dr. Paul for William Goodman. — The deceased intended an executed will; the draft is prepared for execution. Deleg. (c) *Calamy and Limbrey v. Hyde and Mason*.

the sentence were Mr. Justice Page, Mr. Justice Denton, Mr. Baron Carter, Dr. Kinaston, Dr. Simpson, Dr. Pinfold, Jun. and Dr. Edmunds.

(a) *Beaumont v. Sharpe*, Deleg. 31st May 1753. The Judges present at the sentence were Mr. Justice Denison, Mr. Baron Legge, Dr. Collier, Dr. Smalbroke, and Dr. Clarke.

(b) *Sellars v. Garnett*, Prerog. vide supra, Vol. I. p. 509.

(c) *Hyde and Mason v. Calamy and Limbrey*, Deleg. 1731; Com. Rep. 451; Vol. I. p. 423.

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Dr. Collier and *Dr. Bettesworth*, same side. — *Eccleston v. Speake* (a), a paper that cannot operate as a will shall not operate as a revocation. 1 Peere Williams, *Onyons v. Tyrer*. (b)

JUDGMENT — SIR GEORGE LEE.

I pronounced for the schedule; the will of 1740 was not propounded, nor the execution of it proved, so that the schedule stood before the Court as the deceased's only testamentary disposition. His intention was clear to have executed a will pursuant to the schedule, if he had not been prevented by death, and the real as well as personal estate being given to the same person, removed all objection as to its not operating with respect to the real estate. I therefore thought it ought to be established as a good will for the personal estate, agreeable to all the cases that have been cited.

ARCHE'S COURT OF CANTERBURY.

Hilary Term,
February 25.

HOLMES against HOLMES.

Appeal from the Chancellor of London.

In a suit for re-
stitution of con-
jugal rights, no
facts are sufficient
to bar the pro-
ceeding, except
such as would be
sufficient to have
entitled the par-
ty to a divorce
on an original
suit.

Dr. Collier for Mr. Holmes. — Mr. Holmes the husband, brought suit against his wife for restitution of conjugal rights. They were married on the 3d of April 1744. She was a widow, and before

(a) *Eccleston v. Speake*, 3 Mod. 258. and Shaw, 89.
(b) *Onions v. Tyrer*, 1 P. Williams, 342.

marriage, settled all her fortune in trustees for her separate use : the husband, with her consent, borrowed of her trustees 2,000*l.* of her money, to employ in his trade of an ironmonger ; soon after which she, suspecting her husband's affairs were bad, and the said 2,000*l.* being lent on his bond, her trustees did, at her request, take out a statute of bankruptcy against him ; he was forced to abscond, and make a composition with his creditors, and she received a dividend of 436*l.* 19*s.* She went to a house of her own, and would not live with her husband, or suffer him to come and live with her. In Hilary Term, 1754, he returned a citation against her in a cause of restitution of conjugal rights ; she confessed the marriage, but gave a negative issue to the libel, and gave an allegation in bar to her being compelled to live with him, and prayed that she might be divorced from him for cruelty. The Chancellor of London admitted the allegation, from which the husband appealed to the Arches. The allegation pleaded the marriage, his borrowing the said 2,000*l.*, his bankruptcy, and absconding without giving her notice, and the composition, and that she refuses to cohabit with him for good reasons, for that, though he at first behaved civilly to her till he had got her money, yet he is a man of a brutish cruel temper, has abused her, calling her bitch, &c., and swore at her, and on 20th April 1754, he sent Jonathan Forward and one Clive to her house, who came in to her, and soon after he came himself, locked the parlour door, [where she and the said two men were, and swore he would lie with her in presence of said men ; and they said he was her husband, and had a right to do so, and they would hold her for him to lie with her ; whereupon she got out

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of the window, over a palisade, and over to the next house, whither he and the said two men followed her, and he there pulled off her cap, and dragged her by the hair of her head, and attempted to drag her home, but was prevented; and that afterwards he declared, that if he could get her in his power he would send her abroad, where nobody should see her, unless she would give him her money; that, therefore, she could not live safely with him, and prayed to be separated.

JUDGMENT—SIR GEORGE LEE.

I was of opinion nothing could be offered (a) in bar to her living with her husband but such facts as would entitle her to a divorce, in case she had brought a suit against him to be separated for cruelty.

In this case she had charged nothing but words, except the single fact of his dragging her by the hair, which happened after she had separated herself from him, and that was not a cruelty sufficient to entitle her to a divorce; and it was not suggested that he had ever beat her or put her in any danger while they lived together.

I therefore pronounced for the appeal, and rejected the allegation.

She appealed to the Delegates, where my sentence was affirmed in Easter Term, 1757. (b)

(a) See the case of *Foster v. Foster*, 1 Hagg. Consist. p. 153; *D'Aguilar v. D'Aguilar*, 1 Hagg. 784.

(b) The Judges Delegate who were present at the sentence in this case were, Mr. Justice Foster, Mr. Justice Birch, Mr. Baron Smythe, Dr. Collier, Dr. Smalbroke, and Dr. Harris.

Archts
Court.DEARLE and DEARLE *against* SOUTHWELL.Hilary Term.
February 26.*An Appeal from Litchfield.*

Southwell prayed a faculty to be granted to him as schoolmaster of the Free Grammar-school at Stafford, and to his successors, schoolmasters there. Dearle, a parishioner, appeared to oppose it, gave an allegation setting forth his interest and objections; the Court rejected his allegation, and immediately granted the faculty.

A question raised whether an appeal was from a definitive sentence, or from a grievance.

Dearle appealed from both. Fanshawe, proctor for Southwell, prayed that Bishop, Dearle's proctor, might be assigned a term probatory on his libel of appeal, and that the cause might proceed as on an appeal from a definitive sentence. Bishop insisted that his appeal was from a grievance, in rejecting Dearle's allegation, and that the faculty granted ceased on course, as an act done after the appeal, and therefore he did not want a term probatory, for a grievance is to be heard *ex iisdem actis*.

Per Curiam.

But I was of opinion the rejecting this allegation was a final interlocutory decree, having the effect of a definitive sentence, for it was pronouncing against Dearle's interest to oppose, after which he could have no relief in the Court below; besides the appeal was also from granting the faculty, which was the conclusive final act of the Court as to this cause. I was therefore of opinion this ap-

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peal was from a definitive sentence, and assigned Bishop to take a term probatory, and to call on the cause, as on an appeal from a sentence.

PREROGATIVE COURT OF CANTERBURY.

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DYER *against* CALWELL.

A case of fraud
not substantiat-
ed.

Greater regard
should be had to
the evidence of
a witness on
oath, than to his
extra-judicial
declarations.

Dr. Collier, for Dyer.—William Calwell, Esq. died 14th July 1751, at Bristol, where he resided; made his will in February 1749; provided for his children, left the residue to his wife and appointed two executors; left an estate, real and personal, of about 40,000*l.*; was in a declining state of health, from drinking, for six months before his death. 28th February 1750, he set out from Bristol to London, to consult Dr. Ward, at the advice of Dyer, who, with others, accompanied him to London; they made a progress on their way, staid some time in Oxford, and did not arrive in London till the 29th of March, staid there till the 14th of May following. Deceased had great friendship for Dyer, who was a saddler at Bristol. In March 1751, deceased gave instructions in London to one Bradford, an attorney, who had lived at Bristol, to make a codicil to his will. 30th March 1751, Bradford brought it to deceased at his lodgings, who approved and executed it in the presence of the said John Bradford, and William Lucas, the deceased's servant, who attested it. The codicil refers to the will, leaves Dyer's son, a youth at Oxford,

500 $l.$, and to Dyer himself 200 $l.$, which are all the legacies in the codicil, and which are charged on all his real and personal estates; in the beginning of the codicil recites that he had made a will, or deed of gift, or some disposition of his estate, but as his papers were at Bristol, he could not say certainly what, but directs his executors to take this codicil as part of his will. When the deceased returned to Bristol, he staid at Dyer's house about a week, and then went home to his own house. The executors renounced, and on the 9th of May 1752, deceased's widow took administration with the will annexed. Some time afterwards, Dyer applied to her to pay the said legacies, she refused, and then he took out citation against her to bring in the administration, and take a new one with the will and this codicil annexed. Bradford is dead, but we have pleaded his handwriting and character. Lucas is examined, and fully proves the codicil. 23d July 1753, the widow gave in an allegation to impeach the characters of Dyer and of the two subscribing witnesses to the codicil. No imputation on Lucas, but that he is in gaol for debt.

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Dr. Hay, for Mrs. Calwell. — Will dated 16th February 1749, not disputed; deceased appointed executors in trust, who renounced; died 14th July 1751. 9th May 1752, widow took administration *cum testamento*; Dyer knew thereof, but did not produce the codicil till January 1753. Citation returned on the 23d of January 1753. Dyer a saddler at Bristol. Recital in beginning of codicil remarkable, for it shews deceased did not know what his will was; directs the legacies to the Dyers to be paid in six months after his death. Bradford died in April 1752; his death

PARROGATIVE COURT. and handwriting proved ; his character doubtful. Lucas, the other subscribing witness, has a very bad character from our witnesses, and they have not attempted to set up his character ; full proof of Lucas' declarations contrary to his evidence. Deceased a man of fortune, very much addicted to drinking, and easy to be imposed upon. Gave bonds and notes without any consideration for them. Dyer imposed on him ; persuaded him to come to town, and there encouraged him to drink ; he was continually drunk while he was in town ; when he returned to Dyer's house at Bristol, he was kept drunk until near his death. Deceased declared Dyer was a rogue, and endeavoured to get deceased's fortune for his son.

Witnesses for Dyer.

1. William Lucas, examined 19th May 1753.— Deponent was deceased's groom ; deceased being of sound mind died in March 1751, in deponent's presence gave instructions to Bradford for making a codicil ; a few days after Bradford brought the codicil, read it to deceased, who well understood and approved it, and then duly executed it in presence of said Bradford and deponent, who attested it at deceased's request ; deceased was in bad health but of sound mind ; deponent often heard deceased express great regard for Dyer ; he executed codicil with great satisfaction ; believes Bradford is dead ; he had a good character and reputation ; deponent saw him sign his name as a witness to said codicil.

2. William Edwards, gent. — Deponent well knew Bradford at Bristol, who is dead ; he had a good character and reputation ; proves said Bradford's handwriting as a witness to said codicil.

3. Charles Churchman, gent. — Bradford was deponent's clerk; gives him a very good character.

4. George Par.—Proves Bradford died in April, 1752; gives him a very good character.

5. John Fisher.—Says Bradford was an honest man; gives him a very good character.

6. Thomas Spracher.—Proves the death of Bradford; says he was esteemed an honest man.

7. Edward Young, gent. — The same; never heard Bradford's honesty questioned.

N. B.—Calwell's counsel admitted Bradford's handwriting as a witness to the codicil was sufficiently proved.

Codicil read.

Witnesses for Calwell.

1. Robert Harris, merchant.—Deceased drank spirituous liquors to great excess, impaired his understanding thereby; was easy to be imposed on; deceased had a good fortune; deponent never saw Bradford but once with deceased; when deceased returned from London, he staid at Dyer's house eight days; several of deceased's companions have drawn him in to give them bonds for large sums, without any value received; mentions such persons; deponent was an agent to deceased. In February, 1750, Dyer advised deceased to go to London to consult Dr. Ward; on the 28th February, deceased set out for London with Mr. Dyer, Mr. Edgar, Joseph Perkins, Mr. Lucas, his servant, and deponent; deponent saw deceased every day in London, from the 20th March to the 11th April; he was all the time continually drunk, and incapable to make a will; he had strong liquors by his bedside; Dyer had great influence over

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deceased ; Bradford in deponent's presence proposed to deceased to carry him to a bawdy-house.

2. Job Gardiner, brewer.—Deponent knew deceased ; his senses were impaired by drinking, Dyer was his constant companion ; deponent by deceased's order sent beer to Lucas's house for him to sell, which deceased paid for ; William Lucas has a general bad character, and lately was in gaol for debt.

3. William Allen.—Dyer and deceased often got drunk together ; Lucas is a person of bad character.

4. Mary Downes, widow.—Deponent is mother of Ann Calwell ; the party deceased was easy to be imposed on, notes and bonds were obtained from him by Dyer and Lucas ; deceased told deponent Dyer advised him to go to London to consult Dr. Ward ; Dyer was paid 50*l.* for attending deceased to London, after deceased returned from London, he often declared Dyer was a rogue, and would, if he could, get all his fortune from him, for his said Dyer's son. On the 9th May, 1752, administration with the will taken by deceased's widow ; codicil was not produced till January, 1753 ; Lucas has a bad character.

5. John Mauder.—Deceased was much addicted to drinking, and could sometimes be easily imposed upon ; deceased was often at Dyer's house, gives Bradford and Lucas bad characters.

6. Sarah Wise, widow.—Lucas is a man of very bad character.

7. Alexander Edgar.—Deceased was weak in his understanding from drinking, and easy to be imposed upon. In February, 1750, deponent went with deceased to London ; Dyer prevailed on deceased to go by Oxford, to see Dyer's son ; while

in London deceased was continually drunk; after the codicil was executed, Dyer took the first opportunity of leaving London; after Dyer went away, deceased lived soberly while he staid in town; the same day the codicil was executed deponent went out of town; on the Saturday evening deceased was very drunk, and he was the same when deponent saw him on the Monday following; on said Monday, Lucas told deponent Dyer said to him, "Now is your time to take care of yourself, for I have done my business;" Lucas then said, that Bradford read the codicil so fast that he could not understand it, and he believed his master, the deceased, could not, and said they were obliged to make him sign it in bed on a pair of bellows; deceased returned to Bristol on the 14th May, 1751, he then went to Dyer's house and staid there about eight days. Bradford had a general bad character; he brought a whore to deceased's lodgings. On the 5th May, 1753, Lucas declared to deponent and Mrs. Downes, that he was called to be a witness to said will or codicil, it was signed in bed, and it was not read in his presence, and that he asked to see the contents of it, but was denied, and he said he believed deceased did not know that he had signed it, for when deponent told deceased of it, he was very uneasy, and almost crazy about it; Lucas also said the deceased was in liquor from the time he set out from Bristol till after the codicil was executed, and that Dyer endeavoured to get every thing from deceased; Lucas has a general bad character.

8. Thomas Overbury, baker, examined, 22nd October 1753.—Dyer encouraged the deceased to drink. In January, 1753, Lucas being indebted to deponent, he went to his house for the money, and his wife said that her husband was in

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gaol, and that Dyer refused to assist him, because her husband would not wrong his conscience concerning the deed or codicil in favour of Dyer, and said, her husband was very uneasy about being a witness to said codicil. On the 10th June, 1753, deponent went to Lucas in Newgate, and he then told deponent, he believed Mrs. Calwell had a worse opinion of him than he deserved, and then also declared to deponent, that deceased sat up drinking all night before the codicil was executed, and was as much intoxicated as ever he saw him; that when he was called to witness the same, deceased was in bed, and for some time refused to execute it, but was told by the person who made it, that he might sign it, and it was a thing of no consequence, and declared further, that he believed deceased knew no more of the contents of it than the board he (said Lucas) then sat on; that it was not read to deceased in Lucas's hearing, and that if it had been read, deceased was not capable of understanding it; deponent has known Lucas several years, he has a very bad character.

9. Southwell Downes, merchant. — Deponent is brother to producent; deceased drank to excess and was encouraged thereto by Dyer; deceased's capacity was weak, and he was easy to be imposed on; about two years before his death, one Bodville produced a bond for 400*l.* which appeared to be executed by deceased, but deceased denied that he knew any thing of said bond, and said it was an imposition upon him; and since deceased's death, deponent has seen a bond for 200*l.* from deceased to said Dyer, in which no consideration is mentioned but love and affection to Dyer; and also has seen a note from deceased to Dyer for 50*l.* which Dyer said deceased gave him for attending

him to London; has often heard deceased, when sober, say, that Dyer was a rogue, and believes he heard him say that Dyer had abused him, but cannot be certain; in February 1750, deceased, by Dyer's advice, came to London; deceased within a fortnight of his death, said to deponent that Dyer was a rogue, and had done all that he could to get his fortune for his (Dyer's) son, &c.; uttered bitter imprecations against him for his villany. It was publicly known that the widow took administration in May 1752, but the codicil was not produced till January 1753; After January 1753, Lucas desiring to see the deponent he went with Edgar to him in gaol, and Lucas then several times told them that he did not believe the codicil had ever been read to deceased, or that he knew, or was capable of knowing the contents of it, for he was actually in liquor from the time he left Bristol till several days after it was executed; Lucas wrote down the said declaration and offered to swear to it; deceased has declared to deponent that Lucas had held out his leg whilst others have picked his pocket; deponent believes Lucas is a bad man, and he is so reputed.

3. Int. Deceased had a real estate of about 400*l.* a year. 4. Int. He left a personal estate of 33,000*l.* 11. Int. Cannot say of his own knowledge that Lucas was guilty of any crime.

Dr. Collier, for Dyer.—Upon the face of the transaction nothing irregular or suspicious appears.

Dr. Betteworth, same side.—No witness gives Dyer a bad character. Dyer could more easily have procured a codicil at Bristol than at London, with so many people about the deceased. No proof

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that Dyer ever did impose on the deceased ; Harris says he has heard Dyer claim a promise from the deceased that he would do something for him and his family, and deceased made no reply. The deceased's declarations a fortnight before his death against Dyer, arose from his desiring the deceased to do still more for him and his family ; if the transaction had been iniquitous, Dyer would not have disengaged Lucas. Fraud is not to be presumed.

Dr. Hay, for Calwell.—No attempt to support Lucas' character. No declaration leading to this codicil. 30th March 1751, was a Saturday, and Edgar swears he was drunk that day. Dyer obtained a bond for 200*l.* on consideration only of deceased's affection to him.

Dr. Smalbroke, same side.—It does not appear deceased knew of the codicil.

JUDGMENT — SIR GEORGE LEE.

I was of opinion, that though there were many very suspicious circumstances upon the face of the paper itself, as well as from the evidence, yet that there was no proof that Dyer had imposed on the deceased in getting this codicil, or that the deceased was drunk at the time it was executed—that Lucas's character was so much impeached, and his declarations were so fully proved to be contrary to his evidence, that no regard could be had to his testimony, if it had stood alone, but greater regard was to be had to his evidence on oath, than to his verbal extrajudicial declarations, and that evidence was agreeable to his act in subscribing the codicil as a witness, and if his character had been unblemished, his testimony would have been as full,

as one witness could go, to support every thing necessary to establish a codicil — that nothing material was offered to affect the character of Bradford, on the other hand his character was well established, and his subscription as a witness to the codicil being fully proved, or admitted, he must be considered as a full witness in support of Lucas to prove that every thing necessary to establish a codicil was clear—that the signature of the codicil was likewise admitted to be deceased's handwriting, and upon view it appeared to be exactly the same as his signature to the will, which was admitted on all sides to be signed by deceased; the signing to the codicil was in a fair hand, and did not appear to be the writing of a drunken man — that Elgar swears Lucas told him of this codicil the day after it was executed, and it can hardly be doubted but that Elgar, who was deceased's friend, told him of it; and yet deceased never did any act to revoke it, which in all probability he would have done, if it had been an imposition on him.

I therefore pronounced for the codicil, and decreed the widow to take a new administration, with the will and codicil also annexed.

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ROBINSON *against* CHAMBERLAYNE.

Caveat Day,
March 21.

Dr. Simpson, for Chamberlayne.—John Chamberlayne, bachelor, deceased was murdered (as was supposed, by Ann Robinson, his grand-niece, who lived with him), in the night between the 2nd

conformity with his intentions, admitted to probate.

Instructions
neither signed
by the testator
nor read over to
or by him, but
clearly proved
to have been in

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and 3rd July, 1754; he left behind him William Robinson, father of the said Ann, his nephew and next of kin, and William Chamberlayne, his grand-nephew and heir at law. Robinson brought in a will, in which he was executor, but has not propounded it. William Chamberlayne has propounded a schedule, dated 27th June, 1754, which contains instructions deceased gave for making a new will; and which deceased had appointed to execute the 3rd July following. The attorney who drew the instructions proves they were given by deceased, but he thinks he did not read them to him. We have proved deceased's declarations agreeable to them. Robinson gives no opposition.

Witnesses for Schedule.

1. Henry Brampton, gent. — Deponent well knew deceased; it was reported he was murdered in the night between the 2nd and 3rd July, 1754; died a bachelor, leaving William Chamberlayne, his grand-nephew, and William Robinson his nephew and next of kin; deceased expressed great affection for William Chamberlayne; often declared he would make his will and leave him his estate at Englisham. On the 27th June, 1754, deceased came to deponent's house, and gave deponent instructions for his will; appointed William Chamberlayne executor and residuary legatee; sets forth the instructions agreeable to the schedule; deceased ordered him to draw a will from them, but deponent did not read them to deceased; he appointed him to come to execute it on the 3d July following; said he was uncertain what he should leave to Hewer, and therefore a blank is left in the instructions; believes the deceased would have executed the will if he had lived.

2. Thomas Lynn. — Proves deceased's frequent declarations that Chamberlayne should have his estate ; the night before he died, he told deponent that he would the next day give his estate to Chamberlayne.

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Per Curiam.

Though the instructions were neither signed by the deceased, or read over to, or by him, yet as Brampton proved deceased gave them, and appointed to execute a will drawn from them on the 3rd July, and his declaration the night he died, agreeable to the instructions, being proved (a), I pronounced for the schedule, and decreed probate of it to Chamberlayne, the executor.

BROTHERTON, Executor of LADY COOKES WINFORD against HELLIER, by SARAH HARRIS, his Guardian,

March 21.

On Grant of Administration cum testamento.

Dr. Hay, for Sarah Harris. — Samuel Hellier, Esq., left his widow, Lady Cookes Winford, and Samuel Hellier, his son by a former wife, who was and is a minor ; he made a will in his first wife's time, and appointed her executrix ; this will was propounded on behalf of the minor by Sarah Harris, his guardian, assigned for the purpose of carrying on the suit. Lady Winford opposed the for a personal estate. The guardian appointed by this Court preferred to be confirmed in the administration to the guardian appointed by the Court of Chancery.

The guardian of a minor is obliged to exhibit an inventory and account of an administration pendentis.

The Court of Prerogative has as clear a right as the Court of Chancery to appoint guardians.

(a) *Lewis v. Lewis*, 3 Phill. 109.

PREROGATIVE
COURT.

Cavent Day,
March 21.

will. Sentence for it on the 17th December, 1754. Pending the suit, Sarah Huntback, the minor's grandmother, had administration *pendente lite*, and now prays that administration *cum testamento* may be granted to her, she being assigned with Dr. Lyttleton, guardian to the minor in Chancery. The question now is, whether the said administration *cum testamento* shall be granted to Huntback or to Sarah Harris, who as guardian assigned by this Court, obtained sentence for the will; and she also prays that Huntback may give in an inventory and account of her administration *pendente lite*. When the cause upon the will was ready for hearing, Huntback appealed; alleged herself to be grandmother, and one of the guardians of the minor appointed by the Court of Chancery, and prayed that she might intervene for the minor's interest; that in July, 1754 the Court rejected her petition, he having already a guardian in this Court, and no collusion or misbehaviour of the guardian being suggested. Harris was pursuant to the minor's election appointed guardian in this Court without opposition, long before Huntback was appointed by Chancery, who likewise together with Dr. Lyttleton were appointed guardians there without opposition. On the 3rd February, 1755, since the sentence for the will, the minor, who is now 19 years old, confirmed by special proxy his choice of Harris as guardian, and prayed that administration *cum testamento* might be granted to her for his use. We pray that Huntback's petition may be rejected, and that she may be assigned to give in an inventory and account of her administration *pendente lite*. They allege in the act that she ought not to give in such inventory and account, because Dr. Lyttleton her

co-guardian has filed a bill in Chancery for a discovery of deceased's effects against her, and she ought not to be obliged to make a discovery in both Courts, but the parties in the Court of Chancery are different. At the time when sentence was given, the proctors for Huntback and Harris prayed that administration *cum testamento* might be granted to their respective clients.

PRAEROGATIVE
Court.

Caveat Day,
March 21.

Dr. Simpson, for Huntback.—We pray administration *cum testamento* as guardian appointed in Chancery. Dr. Lyttleton has filed a bill in Chancery against Huntback for a discovery of deceased's effects, upon which that Court (as appears by the orders, of which we have exhibited copies), has decreed to proceed. On the 15th July, 1755, subsequent to the date of the proxy that has been mentioned, the minor wrote a letter to Huntback, in which he said, that he had given a proxy to confirm Harris as his guardian, for form sake, but that she would have the administration. This letter amounted to a revocation of the proxy. The Court is bound *ex officio* to grant the administration to the guardian appointed by the Court of Chancery, because that Court has the general guardianship of all minors. Dr. Lyttleton does not join in praying the administration, because then he could not proceed in his bill of discovery; but he has given a proxy to consult and pray that it may be granted to Huntback. The bill of discovery is in behalf of the minor, and therefore she ought not to give in an inventory and account here, for that would put the minor's estate to a double and unnecessary expense.

**PREROGATIVE
COURT.**

**Cavent Day,
March 21.**

JUDGMENT — SIR GEORGE LEE.

I said there were two questions: *First*, whether Mrs. Huntback should be obliged to exhibit an inventory and account of her administration *pendente lite*? And, *Secondly*, to whom the administration *cum testamento*, should be granted?

As to the first I said, this is not like the case of a creditor, or next of kin, who files a bill in Chancery, and prays an inventory here; there the Court will oblige him to make his option, which Court he will proceed in; because it is unjust that the executor or administrator should be harassed in both Courts by the same person for the same thing, but in this case there are different parties in this Court and in Chancery. It would be an effectual method to oust this Court of jurisdiction if I must not decree an account of the execution of a power granted by me, because a third person had thought fit to file a bill in Chancery; and therefore I was clearly of opinion Huntback ought to be assigned to exhibit an inventory and account.

As to the second point, I was of opinion the administration *cum testamento* ought to be granted to Harris; she was originally appointed guardian at the election of the minor, had been guilty of no misbehaviour, but had succeeded in the suit she had carried on for him: — that she was appointed guardian to carry on that suit with all its dependents, and accordingly prayed administration at the time of giving sentence, and I thought her guardianship was not expired by the sentence, but if it was, she was elected again by the minor, who was of age to judge — that his letter was an extrajudicial declaration, which could not revoke his judicial proxy — that I was clearly not bound *ex officio* to

grant administration to Huntback, on account of her being appointed guardian in Chancery, for she could not, by the practice of the Court, have it without being assigned guardian here — that the Court had a right by law to appoint guardians for a personal estate, as well as the Chancery — that Harris was appointed here long before Huntback was appointed in Chancery, and it was strange doctrine that the acts of this Court legally executed, were to be made null by a subsequent act of Chancery, and therefore, upon the whole, I confirmed the guardianship to Sarah Harris, decreed administration *cum testamento* to her for the use of the minor during his minority, and assigned Huntback to exhibit an inventory and an account of her administration *pendente lite*.

PREROGATIVE
COURT.

Caveat Day.
March 21.

SHAND *against* GARDINER.

1st Session,
Easter Term,
April 16.

An interest es-
tablished in a
pedigree cause.

Dr. Hay, for Shand.—John Shand, deceased, died intestate in 1747, left a widow, Alice Shand, but no children. In March 1748, the widow took administration, and is since dead, leaving effects unadministered, she made her will, and appointed Joseph Gardiner executor and residuary legatee. Gardiner entered caveat in the goods of John Shand. Francis Shand appeared, warned the caveat, alleged himself to be cousin-german to the deceased John Shand, and next of kin, and prayed administration *de bonis non*. Gardiner denied his interest; he propounded it, and pleaded that Henry Shand of Aberneth in Scotland, the common ancestor, had issue by his wife, Ufran, a son named

PARROGATIVE
COURT.

Easter Term,
April 76.

Alexander, who by his wife had issue, John Shand, the deceased, and that the said Henry and Ufran had also issue another son named Patrick or Peter, who had lawful issue, Francis Shand, the party in this cause. Alexander was a dragoon fifty years ago; Patrick was a servant in Scotland. We have no exhibits or written evidence to prove the pedigree, but having proof of owning among the several persons of the Shand family, it is sufficient.

Dr. Pinfold for Gardiner. --- Alice, deceased's widow, died in 1750, three years after her husband, and during all that time Francis Shand never claimed as next of kin. They say Alexander married in 1696, and had issue, John, the deceased, and that Patrick married, in 1718, to Eleanor Hutchinson, and had issue Francis, the party, but they have not proved either of the marriages, and there was no intercourse or correspondence between the deceased and Francis. We have not pleaded, but rest the cause upon Shand's evidence.

Witnesses for Shand.

1. James M'Cormack, esq. 59. examined in 1754. --- In 1722 deponent met with John Shand in London accidentally, and they being countrymen drank together, and he then said he lived in Blackfriars, and was married and had a child; and to the best of deponent's remembrance, he said his father's name was Alexander, and that he was a soldier, and his family lived in Scotland; it is about twenty-nine years since deponent has seen him. In 1708 or 1709, deponent saw one Alexander Shand, a dragoon, in Flanders, who said he

lived at Aberneth in Scotland, and deponent and he became intimate. Alexander spoke of his son John, who, deponent believes, was the deceased in this cause. In 1718 deponent was two months at Aberneth, and was several times there treated by one Henry Shand and Ufran his wife, who, deponent believes, were the persons articulate, and they often spoke of their son Alexander, who, they said, was in the Scotch Greys. In 1726 or 1727, deponent again met with said Alexander in Ireland; deponent has heard that said Alexander had a brother named Patrick, and deponent heard him speak of such brother, and likewise heard Henry and his wife speak of their son Patrick; believes Francis, the party in this cause, is related to John Shand, the deceased.

11. Int. Believes Francis was in London some years before John died; respondent never heard they had any intercourse together. 14. Int. Never heard of any other family called Shand.

2. William Angus, shoemaker, æt. 50. — Deponent well knew deceased; first knew him by deponent's being acquainted with his father; believes Francis is the son of John Shand's uncle Peter; deponent first knew Alexander about the year 1715; he was then in the Scotch Greys, and spoke of his having a wife and child, and deponent afterwards saw said wife and her son, who deponent knows was the deceased in this cause, who was then reputed to be said Alexander's lawful child; believes said Alexander and his said wife died in Ireland; deponent made shoes for deceased and his father; Peter Shand came to Perth to see Alexander, and they often came together to deponent's father's house, and they owned each other to be brothers; deponent saw Peter about

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thirteen years ago at Colonel Ogilvie's in Scotland ; he had then a son called Francis, who he owned to be his lawful child by his then wife ; deponent knows that Francis the party is the said boy.

3. Richard Jennings, æt. 66.— About thirty-three years ago deponent was a soldier in Ireland, and there met with Alexander Shand, who was quarter-master in the Scotch Greys ; he had then with him a woman and child, who he owned as his wife and child ; does not know that deceased was the said child.

14. Int. Respondent has heard there were two families of the name of Shand in Scotland, one in Caithness and the other in Perthshire.

Read William Angus, to 15. Int. who deposed, that he never heard Francis was in London before John Shand died ; never heard they corresponded together ; believes Francis always knew of his relationship to John, but did not know of his death till after his widow Alice died ; deceased and his uncle Peter corresponded together, as deponent has heard them say.

4. Sarah Brown, æt. 34.— Deponent first knew deceased about twelve years ago, by lodging in the same house with him ; does not know what relations he left, but as she best remembers, has heard him say his father's name was Alexander, and has heard John's mother-in-law, said Alexander's second wife, for whom said John received a pension as an officer's widow, speak of one Patrick Shand as a relation, and deponent has heard John say he had relations.

8. Int. Respondent does not know any of the family of the Shands. 15. Int. Does not know producent ever claimed to be related to deceased.

5. Mary Angus, æt. 36.— Deponent did not

know deceased, but knew his widow, Alice ; has often heard her say her husband's name was John, and his father's name was Alexander, and that he was a dragoon ; has known her to be very uneasy about a young man, a relation of her husband's, but deponent did not know who he was.

PREROGATIVE COURT.

Easter Term,
April 16.

JUDGMENT — SIR GEORGE LEE..

There being no objection to the witnesses, and William Angus having sworn to his knowledge of the parties, and the ownings of the relationship between Alexander and Peter or Patrick, as brothers, and his evidence being confirmed with respect to many circumstances by the other witnesses, I pronounced for the interest of Francis Shand, and swore him administrator *de bonis non.*

KING *against* GORDON and Others.

2d Session,
Easter Term,
April 23.

At the instance of King, a creditor, I decreed letters of request to the Commissaries for Probates, &c. in Scotland, to cite the next of kin who resided in Scotland, to appear and accept administration, or shew cause, &c. The commissaries accepted the letters of request, cited the parties personally, and returned a regular and proper certificate of the service, but the next of kin not appearing, I decreed administration to the creditor.

Letters of Request addressed to the Commissary for Probates in Scotland to cite a party to appear in the Prerogative Court.

N. B. This was the first instance of sending letters of request to Scotland to cite parties to appear in the Prerogative. The practice used to be to cite them by a process on the Royal Exchange, but it being extremely probable the next of kin

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COURT.

Easter Term,
April 28.

living in Scotland might never hear of such process, and administration might be granted from them to their great prejudice, I tried this method of sending letters of request to the commissaries, and finding in this instance, that they have accepted and duly executed them, I have directed that it shall be a standing rule, to cite next of kin residing in Scotland by letters of request.

ARCHES COURT OF CANTERBURY.

3d Session,
Easter Term,
April 28.

FLEET, formerly KINGSTON *against* HOLMES, formerly KINGSTON.

(Upon Admission of an Allegation.)

Arches Court
has no jurisdiction to determine the allowance to be made for the maintenance and education of minors.

Dr. Hay, for Sarah Holmes.—Samuel Kingston, Esq. died the 22nd June, 1736, left Sarah, now married to Holmes, his widow, and only one child, his daughter Mary, now married to the Rev. Mr. Fleet. On the 11th January, 1735, he made his will, and appointed his wife sole executrix, and residuary legatee; left a legacy of 1000*l.* only to his daughter Mary, to paid her when she came to the age of 21 years; she arrived at that age on the 2nd June, 1753; she then brought a suit against her mother in this Court for the said legacy of 1000*l.* with interest from the death of the testator; the mother appeared, and tendered the legacy of 1000*l.*, with interest from the time Mary came of age, which Mary refused. We are now

before the Court with an allegation in bar to interest till Mary came of age. We set forth, that Mary was but four years old when her father died, and that from that time till the 31st October, 1750, when she married, she lived with her mother, and was clothed, educated, maintained, and supplied with every thing by her, and therefore we pray the Court will pronounce no interest to be due; or at least, that the expences for her maintenance, &c. may be allowed out of the legacy and interest, and for that purpose, the allegation sets forth the annual expense and allowances craved for the several periods of the infant's minority.

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April 28.

Dr. Simpson, contrà, for Fleet. — Deceased left his wife a large real estate, and 6000*l.* personal estate; she is now married to Holmes; it cannot be imagined that he intended his daughter should pay for her maintenance and education out of a small fortune of 1000*l.*, when he left his wife, the child's own mother, so large an estate. This is a vested legacy, and being from a father to child, carries interest; they tendered the legacy and interest only from the time she came of age. We insist on interest for 17 years from deceased's death. Holmes admits in her answers that she has made interest of the money. I shall not make particular exceptions to the allegation, but shall object to the whole. This Court has not jurisdiction to determine on debts, nor on what allowance shall be made for maintenance and education of minors. Arches, 1721, an executor pleaded he had bought clothes, and paid money for the legatee, but as that was matter of account, and proper for the Chancery, it was not allowed to bar or discharge the legacy, and the allegation was rejected.

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EASTER TERM,
April 28.

Upon that occasion *Fletcher's* case, to the same purpose, was cited. Arches, 3rd sess. Michaelmas, 1721, *Darby against Wiltshire*, the executor who was a stranger, not a parent, alleged maintenance of the minor in bar to suit for a legacy; allegation rejected, for he must go to the Chancery for relief for the maintenance.

Dr. Bettesworth, same side.—The allegation seems to admit that interest is due; it cannot be presumed that the testator intended the daughter should pay for maintenance out of 1000*l.* fortune, when he left so great estate to the mother.

Dr. Hay, for Holmes.—Precedents in Chancery, 337, if a father gives a legacy to a child, payable at 21, it shall carry interest, because a father is bound to maintain a child, but it is otherwise in a legacy from a stranger.

JUDGMENT—SIR GEORGE LEE.

I was of opinion this Court had not jurisdiction to try and determine upon the matters contained in the allegation, and therefore rejected it, and concluded the cause.

Holmes appealed the 25th June, 1756; the Delegates affirmed my decree; the Common-law Judges, Forster, Birch, and Smith, all clear that the Arches could not decree the maintenance.

ARCHES
COURT.HUSSEY *against* ANDREWS and MOORE.Easter Term,
April 26.

Lydia Waters made her will, and appointed Benjamin Butress and John Bearblock executors, and Judith Andrews and John Moore residuary legatees; gave a legacy of 5*l.* to Miss Lucy Hussey, to buy her a watch, and 10*s.* for a ring; executors renounced, and in 1746, administration *cum testamento* was granted to the residuary legatees. In 1754, Hussey brought suit for the legacies, the administrators gave a negative issue, but their proctor confessed subscription and identity of the clause of the will; afterwards, their proctor declared they would proceed no further. Hussey prayed interest from a year after the death of the testator, from December, 1747.

JUDGMENT — SIR GEORGE LEE.

I decreed the legacies to be paid, but without interest, because it did not appear that the administrators had been *in mord* till after the suit, and that interest was so trifling, that the legatee did not insist on it, and also I did not think the legacies carried interest, but I gave 12*l.* costs.

PREROGATIVE COURT OF CANTERBURY.

CARYLL *against* KNIGHT.3d Session,
Easter Term,
April 30.

Dr. Hay, for Knight.—Charles Caryll deceased, died on Sunday, the 27th October, 1754; about

A will estab-
lished.

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COURT.
—
Easter Term,
April 28.

two hours before his death he executed his will, and appointed Knight his executor and residuary legatee. John Caryll, as cousin and next of kin, cited Knight to prove the will by witnesses; Knight propounded it, and has examined three witnesses, who prove that on the 26th October, 1754, deceased being very ill, Knight asked him whether he had any valuable effects by him, because he had only a nurse with him, and how he would have them secured, whether by him and Gray, who were present, or either of them; deceased said, by you; Gray withdrew, and then deceased gave Knight directions about his will. Caryll has interrogated the witnesses, but has not pleaded.

Witnesses for Knight.

1. John Gray, apothecary.—Knight, deponent, and deceased were intimately acquainted together; on the evening of Saturday, the 26th October, 1754, deponent and producent were with deceased; producent asked deceased if he had any thing valuable about him, as he had only a nurse with him? deceased said he had a note for 100*l.* in his bureau, and four or five guineas, and vouchers for two prize tickets of 10*l.* each in the Irish lottery; Knight asked him if he would have them secured, he said "Yes, by you;" deponent then went out of the room, and when he returned in again, deceased said to deponent, he had given deponent twenty guineas, his effects were small, and he hoped he would be satisfied with that for his trouble and attendance; Knight was going to tell deponent what had passed between deceased and him, but deceased said, "You need say no more of that;" next morning, deponent went again with producent to deceased, but deponent was not then

in deceased's room ; they then went to Mr. Brown's house, but he being at church, came afterwards to producent's lodgings, and there drew the will pleaded, from instructions drawn by producent, and then they all three went to deceased with said will ; when deceased was raised up in his bed, he fainted away, and had some wine and drops given him ; then Brown read the will to deceased, and there being a blank for Mrs. Morgan, a legatee's christian name, deceased said it was Mary, and the blank was accordingly filled up ; deceased attempted to make a mark to the will, but was so weak he could not hold the pen, and then Brown put a pen in his hand, and guided it to make a mark to the will, and then deceased in a scrambling manner took a seal off the wax, and being asked if he published it as his will, he pushed it towards producent, but said nothing ; deceased was perfectly in his senses.

4. Int. Deponent was voluntarily present at the execution.

N. B. He has renounced his legacy.

2. Edward Brown, gent. — On the morning of Sunday, the 27th October 1754, producent called on deponent to go to deceased ; deponent was at church ; when he came home, and heard producent wanted him, deponent went to producent's lodgings ; producent there gave deponent instructions in writing, from which he then drew the will pleaded ; deponent, producent, and Gray, who was present, then went to deceased ; deceased was very weak and fainted, and took drops, and then deponent read the will audibly to him, and there being a blank for Mrs. Morgan's christian name, and deceased being asked, he said her name was Mary ; deceased did not say he approved the

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will, but he did not object to it ; he was so weak that though he attempted, he could not make his mark himself ; but deponent guided his hand. Knight said to deceased, " You publish this to be your last will ;" deceased did not answer, but Gray repeating the question, deceased said " Ay, ay ;" when deceased took drops, before the execution of the will, he said he had enough ; deponent from the above said circumstances, verily believes deceased was perfectly sensible ; deponent and Chalk witnessed it.

7. Int. Deceased was as weak as possible in body, but believes he was very sensible.

3. Mary Chalk.— Deponent was nurse to deceased at his death ; he died about two hours after the will was executed ; producent or Brown told deponent deceased desired her to witness the will ; deceased made his mark, and sealed said will, and said something, but deponent did not hear what, deponent and Brown attested it, the will was not read in deponent's presence ; verily believes deceased was of sound mind, he spoke sensibly to deponent just before.

6. Int. Deceased was very weak ; he made his mark himself, and his hand was not guided.

Dr. Hay, for Knight. — Gray deposes to deceased's recognition of the instructions ; deceased himself said Morgan's name was Mary, which shews capacity ; he pushed the will towards Knight, which likewise shews he knew it was a will for Knight's benefit.

Dr. Simpson, for Caryll. — The Court could not have pronounced for the instructions, because there is no proper proof of them ; none were taken

down in writing on the 26th at night. Knight first shewed them to Gray on the 27th in the morning; deceased was dying, and had not a capacity sufficient to understand the effect of his will; Coke, 6 Report, f. 23. *Marquis of Winchester's* case. *Coombe's* case, Moore, 1051, a testator must have a mind adequate to what he is about; there is no proof of an *animus testandi*.

PREROGATIVE COURT.

Easter Term,
April 30.

JUDGMENT — SIR GEORGE LEE.

Though the proof for the will was very slight, I thought myself obliged to give sentence for it upon the evidence of Gray; that deceased told him he had given him twenty guineas on 26th of October. From the evidence that deceased said Morgan's name was Mary, which shewed he knew what had been read to him was his will, and from the concurrent testimony of all the witnesses, that though the deceased was extremely weak in body, he was perfectly in his senses, and there being no contrary evidence, nor any exception to the witnesses, except what arose from slight contrarieties on circumstances, I pronounced for the will.

MOORE, formerly HACKET, *against* HACKET.

April 30.

William Hacket, deceased, made his will, dated 27th May 1754; his wife executrix and residuary legatee; left several children by a former wife, William Hacket, his eldest son, opposed this will, but afterwards gave up his opposition, and the

A will executed in conformity to instructions, established, though the testator had become incapable before the will was read over to him.

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cause was heard *ex parte*. This last will was as to the general purport conformable to a former will, and was made only to provide for a child which was born after making the first will.

Witnesses.

John Smith, gent. — Proves full instructions from deceased's mouth and the former will, his reading them, and deceased's approbation thereof, and that the will is exactly agreeable to the instructions, but says, while he was writing the will, deceased (who, when he gave the instructions, was perfectly in his senses) had a paralytic stroke, and he being very ill, deponent did not read the will to him. Proves execution; believes deceased knew it was his will that he executed, but thinks he had not then capacity enough to have understood the whole will, if it had been read to him.

Another witness was read, who swore to deceased's capacity at the time of giving the instructions, to execution, and to a degree of capacity at that time.

JUDGMENT—SIR GEORGE LEE.

Upon this evidence of the instructions and of the conformity of the will to them, and of his capacity at that time, and there being no opposition, I pronounced for the will.

ARCHES COURT OF CANTERBURY.

ROBINS *against* SIR WILLIAM WOLSELEY.

4th Session,
Easter Term,
May 9.

Sir William Wolseley sued Mrs. Robins as his wife, in the Consistory of Litchfield, by the name of Lady Wolseley, for a divorce by reason of adultery with John Robins, Esq., gave in a libel in which he pleaded that he was married to her on 23d September 1752, and pleaded facts of adultery with Mr. Robins. She denied the marriage with Sir William, gave a general negative issue to the libel, and then, *loco responsi*, gave in an allegation in bar to the suit, in which she set forth that she was married to Mr. Robins on 16th June 1752, prior to the time when Sir William pretended she married him ; and, therefore, she being the wife of Robins, Sir William had no right to bring a suit against her. The Court admitted this plea, and ordered that the parties should proceed and examine witnesses on the libel and this plea *pari passu*, from which and other grievances she appealed to the Arches.

An application
for the examina-
tion of witnesses
de bene esse, re-
jected.

JUDGMENT — SIR GEORGE LEE.

I was of opinion that the cause for adultery ought to be stayed till it was determined whether she was married to Robins prior to the 23d September 1752, for, if she was, Sir William could have no right of action against her, and I retained the cause. Sir William pleaded in the Arches in contradiction to her plea in bar, and she gave in an

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allegation in answer to his, and now as it was likely to be some time before this previous point could be determined, Sir William prayed that he might be at liberty to examine witnesses *de bene esse* on his libel, upon a general suggestion, and an affidavit that a material witness was an officer in the army, and might be sent abroad, and that witnesses might die before the previous point was determined. But I was clearly of opinion to reject this petition, because either the witnesses must be examined *ex parte*, which would be unjust, and would deprive her of her defence, or if she put interrogatories to the witnesses, she would be forced into a suit, while it was *sub judice* whether she was subject to such suit or not.

May 26.

SEWELL and Others *against* TWYFORD and MANN.

Appeal from the Consistory of London.

In making a church rate, the lessees of a market are to be assessed according to the real produce of the tolls, and not according to the rent only.

Twyford and Mann, churchwardens of the parish of St. Faith, London, brought suit in the Consistory of London against Sewell and others, for a church rate, it was pleaded in the libel that in 1753 the church was repaired by order of vestry, and a rate for that purpose was made at two-pence-halfpenny in the pound, and that Sewell and others, lessees from the city of London of the tolls of Newgate market, were duly rated, in said rate, the sum of 15*l.* 4*s.* 2*d.*, the tolls of the said market producing annually 1460*l.*, and that they were assessed at that rate to the land-tax; they refused to an-

swer whether the tolls produced 1460*l.* in 1753, and whether they were assessed at the rate of 1460*l.* to the land-tax in that year. The Chancellor of London was of opinion they ought to answer to those facts, and decreed fuller answers. The lessees appealed to the Arches, and I confirmed the decree, but the cause was retained by consent. In their fuller answers they confessed that they were in 1753, and still are, lessees of the tolls of Newgate market; that they were assessed to the land tax at 1460*l.* a-year; say they pay only 700*l.* a year rent to the city, and gave a fine of 700*l.*; that they are unequally assessed, and that they are not obliged by law to answer further.

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COURT.

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May 9.

JUDGMENT—SIR GEORGE LEE.

But I was of opinion they are to be assessed according to the real produce of the tolls, and not according to the rent only, for supposing it should be a custom in a parish for landlords to reserve very small annual rents, and take large fines, there would be little or nothing to be assessed, and so the church must go to ruin; and I was of opinion they were bound by law to answer whether the tolls in 1753 produced the sum of 1460*l.* or what sum, and accordingly decreed fuller answers.

Fox *against* GILBERT.

May 26.

Appeal from Wells.

Dr. Hay, for Gilbert. — John Gilbert deceased made two wills, the first dated 6th July 1750, wherein Stephen Fox was sole executor and resi- Capacity estab-
lished.

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duary legatee ; the second will dated 17th September 1751. The date was a mistake, for the will was really executed on the 12th September 1751, and that mistake is accounted for ; deceased died on 15th September, in this will Luke Gilbert, who was deceased's nephew, his heir at law, and only next of kin, was appointed sole executor and universal legatee. Fox opposed this will. Both the wills propounded ; the Court at Wells gave sentence for the last will ; Fox appealed, and the cause is now to be heard upon the same evidence as below. Deceased had great affection for Luke Gilbert, Fox was a stranger in blood to him, deceased lived in Somersetshire, Luke Gilbert at Deptford in Kent. The will in favour of Fox was obtained by his cajolery, who used to treat the deceased who was very covetous. In September 1751 Luke went to see his uncle, who received him well, and then deceased declared he would make a new will, particularly that Mr. Hayman should make it for him. But we admit there is some contrary evidence of declarations that he would not alter his will ; on 11th September, in the night, deceased was very ill, and then said to Thomas Millar, who sat up with him, that he would make his will ; thereupon one Philip Stride, who accidentally lay that night in the house, was called up to make it, the will was made by interrogation, execution, approbation, and capacity, fully proved by all the witnesses except one, who says he was not sensible.

Dr. Simpson, for Fox. — Admit the last will is dated 17th September by mistake. We have appealed from the sentence for the last will. Great intimacy between Fox and deceased ; full proof of such affection continuing to deceased's death.

Luke applied to Fox to solicit deceased to make a will in Luke's favour, Luke himself pressed deceased on 1st of September to make a will, but he refused. On 8th September, the deceased fell ill, Luke again attempted to get Fox to solicit deceased to make a will, but deceased again refused. On 10th September deceased declared he would not make a will; the same on 11th September. Millar called up Ann Buckley in the night, said he had now got deceased in the mind to make a will, and if she did not make haste he might change. He was not sensible at the time of the execution; the foundation on which their witnesses swear he was sensible is, only that he answered yes to questions; no *animus testandi* proved, nor sufficient proof of capacity.

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Witnesses for Gilbert.

1. Thomas Millar.—Deponent well knew deceased; deponent's mother rented a public house of deceased, where deceased lodged and boarded at his death; on 11th September, Philip Stride lay at said house; in that night deponent asked deceased if he had made a will, he said "Yes," but it was not to his mind; deponent asked him if he would make a fresh will, he said "Yes" he would; deponent thereupon called up Stride, who he said would make deceased's will for him; they then went to deceased; deponent asked him if he was willing to make Luke Gilbert his sole executor, he said "Yes;" deponent reminded him that he had another relation, John Gilbert, and asked whether he would do anything for him, or his child, deceased answered only "Pho!" and thereupon from such answers Stride wrote the will pleaded, and read it to deceased; deponent asked deceased if

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the will was to his content, deceased said "Yes, it is;" deponent told him if he liked it, he must sign it; deceased then took a pen and made his mark to the will; deponent then asked him if that was his last will, he said "Yes;" deponent told him he must deliver it as his last will; deceased took it out of deponent's hand and delivered it to producent, and then deponent and the others attested it, but deceased did not ask them to attest it; he was very sensible, accounts for the mistake of the date; deceased died 15th September.

2. Int. The night deceased died he was very sensible. 3. Int. No other discourse than as pre-deposed, passed at the execution of the will, except, that deceased being asked whether he would drink, answered, "No;" but he answered distinctly to all the aforesaid questions.

2. Philip Stride.— Deponent well knew deceased; on 11th September 1751, deponent lay at Sarah King's house, where deceased then lay ill; in the night Millar called deponent up to deceased to make the will; deponent went, and Millar asked deceased if he would make a will, he said, "Yes;" deponent asked deceased how he did, he said, "Very ill;" deponent asked him if he would give any thing to his poor relations, he made no answer; deponent asked him if he would give all to his kinsman, Luke Gilbert, and make him executor, he replied, "Yes;" then Millar and said Luke desired deponent to write the will; deponent did so, and then read it to deceased; deponent asked deceased if he understood it, he said, "Yes;" deponent asked him if it was to his content; he said "Yes;" deponent told him he must make his mark to the will, Sarah King guided his hand to make a mark; Millar then bid deceased

deliver it, and he did deliver it to producent ; deceased answered sensibly, and deponent believes he was fully in his senses ; the will was executed early in the morning of 12th September.

3. Int. No other discourse passed at the execution.

3. Sarah King. — Deceased boarded at deponent's house ; on 12th September he was very sensible, for he answered questions readily ; Stride wrote the will and read it to deceased, and he said he like it ; proves execution and delivery of the will by deceased to Luke, and capacity.

2. Int. Deceased answered questions plainly and distinctly, but said nothing else.

Read said last will.

The counsel for Gilbert admitted the first will was duly made, and the counsel for Fox read it, to shew that deceased had therein provided for Luke Gilbert, to whom he had given 100*l.* and for all his friends.

Witnesses for Fox.

1. Thomas Fox.— Deponent is son to producent and well knew deceased ; great intimacy between producent and deceased, and producent managed business for him ; deceased never spoke to deponent of Luke Gilbert ; deponent has heard that deceased was angry at Luke's coming to him in September 1751 ; proves the first will.

2. Joseph Brown. 3. John Weeks.—Admitted ; they depose to the same effect, and prove the first will ; not read.

4. Ann Buckley. — On Sunday, the 1st September 1751, Luke in deponent's presence, asked deceased to make another will, deceased said he

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would not ; a day or two afterwards, Luke asked deceased where his will was ; he replied, " Stephen Fox knows of it." On the 14th September deceased was speechless ; on the 12th September, in the morning early, deponent and Sarah King being in bed together, Millar came into their room, and said he had got deceased into a mind to make his will, and he must make haste for fear he should change his mind ; they got up, and went to deceased, and found Stride writing the will ; deponent heard Millar ask deceased if he would not make Luke sole executor ? he made no answer, but groaned ; deponent was twice in the room while the will was writing, and deceased did not speak ; same day, John Gilbert came to see deceased ; on the said 12th September deponent did not hear deceased speak one word, or afterwards, but he appeared senseless to his death ; after the will was made, Millar said it was done, " but I was forced to put the pen in his hand, and guide him to make the mark ;" believes deceased was never sensible after the 11th September.

5. James White.—On the 8th September 1751, Luke and Fox talked about deceased's will, Fox said he had made one, Luke desired Fox to get deceased to make a new one ; Luke said they had tried to get deceased to make a new will, but could not prevail on him to make one : on the 10th September, Fox in deponent's presence told deceased that his kinsman Luke desired he would make a new will ; deceased replied, " I will make no other will ;" on the 12th September, Luke sent for deponent, and deponent went to him, Luke shewed deponent the will, and desired him to draw another will to the same effect, but in a better form ; deponent wrote one accordingly ; Luke went with

it to deceased, but when he came back again from deceased's room, he said deceased had a great many people with him, and he could not get it executed.

6. Elizabeth Baker.—On the 10th September 1751, Sarah King desired deponent to speak to deceased to make a new will ; deponent asked him if had made his will, he then replied, he had made one to his mind, and would not alter it, and said Luke desired him to make another will but he would not.

7. Sarah Gilbert.—Deceased always spoke kindly of Fox, and said he was obliged to him for taking care of his affairs, and that he would make him amends ; has heard deceased say he never sent to Luke at Deptford ; the intimacy between deceased and Fox continued to his death : on the 11th September, deponent, in presence of John and Luke Gilbert, asked him if had settled his affairs, and had made his will ; he answered, he had made his will, and would not alter it ; deponent asked where his effects lay ? he said, " Stephen Fox ;" Luke bid deponent be quiet, for deceased was not in a condition to be talked to ; believes he was not capable of making a will after the 11th September 1751.

Witnesses for Gilbert.

1. Sarah King, widow.—Luke was deceased's nephew, next of kin, and heir at law ; deceased behaved with great affection to him ; producent often wrote letters and sent presents to deceased, which he received with great pleasure, and deceased often sent letters and cheeses to producent ; deceased could not write, and deponent's daughter wrote letters for him ; deceased kindly received

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and entertained producent in September 1751; deceased was very covetous; deponent having observed deceased to be very uneasy, asked him what was the matter? he said he had a will, but it was not to his mind, and said Mr. Hayman should make him a new one; Hayman came to deponent's house, but deceased was not then at home, and deceased afterwards expressed great sorrow that he did not see him; deponent about three weeks before deceased died, heard Mr. Webb had been to make deceased's will.

2. Thomas Millar.—Deceased spoke kindly of producent, and said he wished he lived in the country; deposes to presents and letters that passed between deceased and producent; deceased was eighty years old, very covetous, loved to be treated, and would promise legacies to those who treated him; about three months before his death, deceased walking with deponent in the fields, said John Gilbert had used him ill, and said he would give him nothing more, and then declared his will was not to his mind, and he made the same declaration the night the last will was made.

4. Int. Webb came deceased's lodgings the day he was taken ill, but did not see him.

3. Mary Clarke.—Deceased spoke much in praise of producent; the 2nd September 1751, deponent heard deceased say that Luke was with him, and that he would make his will while he was in the country, and said he would give nothing to John Gilbert, or his child.

4. John Clark.—Says deceased spoke well of Luke; on the 2nd September 1751, deceased told deponent that Luke was with him, and said he would make his will while he was in the country, and give him all, and make him executor; said he

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was sorry he was not at home when Hayman came to his lodgings.

5. John Clark, jun.—Deposes exactly the same as the last witness as to deceased's declaration on the 2nd September, at which this witness was also present.

6. John King.—Says deceased was very angry with John Gilbert, and said he would give all he had to Luke.

7. Ann Clark.—Deposes to deceased's affection to Luke, and proves several letters that were sent by deceased's orders from deceased to Luke.

1. Int. Deceased said once, but deponent cannot tell the time, that he had made a will, but it was not to his mind.

Several letters from deceased to Luke read, which shew affection, and sending of presents.

Dr. Hay's argument for Gilbert.—Ann Buckley, their chief witness does not pretend deceased was incapable on the 11th September ; no imputation on the subscribing witnesses, who swear fully to capacity.

Dr. Bettesworth, same side.—Hayman did not see deceased, and therefore there was nothing to examine him to. Ann Buckley supports our witnesses ; if deceased had not been in his senses, Luke could not have been weak enough to have endeavoured to have got him to execute the will made by White on the 12th of September, which was only to amend that made by Stride in point of form.

Dr. Simpson, for Fox.—Will in favour of Fox was made subsequent to all the letters from de-

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ceased to Luke, except one, and therefore, those letters prove nothing in favour of Luke; in this case the testator must have an *animus revocandi*, as well as *testandi*.

Dr. Pinfold, same side.—Law presumes a permanency of intention. Original intention was not to give all to one person. Will made in great hurry; deceased not then dying. *Coombe* case, Moore's Reports, testator must have a mind adequate to what he is about. The witnesses differ as to the circumstances of guiding deceased's hands. No subsequent confirmation of the last will.

JUDGMENT — SIR GEORGE LEE.

As the last will was in favour of deceased's nearest relations, and the testamentary witnesses swore positively to his capacity, approbation, and execution of it, and as several witnesses swore to his declarations that the first will was not to his mind, on which declarations I thought more stress ought to be laid than on the contrary declarations, because they came voluntarily from the deceased himself, whereas the other declarations were only answers to questions put to him by persons to whom perhaps he did not care to open his mind, I pronounced for the last will, confirmed the sentence given at Wells, with 30*l.* costs, and remitted the cause.

PREROGATIVE COURT OF CANTERBURY.

EATON *against* BRIGHT and SANDLANDS.1st Session,
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tablished in a
pedigree cause.

Dr. Bettesworth, for Ann Eaton.—Mary Nonelly deceased ; died in September 1751, intestate, a spinster, left Ann Eaton, her cousin-german and next of kin. Bright and Sandlands, as executors, proved a pretended will of deceased. Eaton cited them to prove it by witnesses ; they appeared and denied Ann Eaton's interest ; she propounded it and pleaded that Richard and Magdalen Hoggins were grandfather and grandmother of deceased and Eaton. Admit the marriage of them (which must be above 100 years ago) is not proved. They had two daughters, Ann and Elizabeth, who they always owned to be their legitimate children. Ann married Humphry Nonelly, and had issue by him, the deceased. We have proved deceased was born about 1677, but the register of that time is damaged, and not legible. Elizabeth married Richard Butcher, and had issue by him Ann Eaton, the party.

Dr. Simpson, contra. — We have not pleaded. No proof of the Christian names of the grandfather and grandmother, the common ancestors. No entries of the baptisms of their daughters ; only parol evidence of ownings.

JUDGMENT—SIR GEORGE LEE.

It being admitted that there was full proof that Ann and Elizabeth constantly owned each other

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to be sisters, and that the deceased owned and used to speak of Ann Eaton as her aunt, Elizabeth Butcher's daughter, and as her cousin and next of kin, I pronounced for Ann Eaton's interest, and condemned Bright and Sandlands in costs, to be taxed moderately, because there was no evidence that affected them with the knowledge of Eaton's relationship to deceased.

ARCHES COURT OF CANTERBURY.

3d Session,
Trinity Term,
June 9.

SMITH *against* LOVEGROVE.

Appeal from Consistory London.

The chancellor
of the diocese of
London is not
invested with
authority to
grant licences to
lecturers.

The bishop
has the general
superintendence
of the clergy
within his dio-
cese, and no
one without his
permission can
perform the cle-
rical functions
within such dio-
cese.

Dr. Bettsworth, for Lovegrove. — Citation is issued against the Rev. Mr. John Smith, at the promotion of the judge's office, by William Lovegrove, Esq. for performing the office of lecturer of St. John's, Wapping, without licence. Articles given in and admitted, proved, and sentence against Smith, by which he was admonished not to do any duty as lecturer at St. John's or elsewhere in the diocese of London, till he first has obtained a licence.

Dr. Hay, for Smith. — Smith was ordained deacon on 2d of March 1734, by the bishop of Landaff, and priest, 10th March, 1754, by the bishop of Norwich. In the last war he was a chaplain in the navy, and since has officiated occasionally for several clergymen; he has a wife

and three children, and no support but this lectureship. In 1750, he officiated for Bean, the then lecturer of St. John's, and on his death he was elected himself in 1752 to that lectureship ; in that year he applied to the bishop of London for priests' orders, but the bishop refused to examine him ; A bishop may refuse ordination without giving a reason. After his ordination as priest, he applied to the Archbishop of Canterbury to grant him a licence as lecturer, he refused, because his predecessors had not for forty years past granted licences for lectureships in other bishops' dioceses. Archbishops or bishops may grant those licences. He then applied to the Bishop of Winchester for licence to preach in his diocese, the bishop said he did not put his clergy to the expence of licences, and bid him preach without one. On 2d April 1754, the parishioners of St. John's, in vestry, confirmed him lecturer. On 3d April 1754, a citation issued against Smith to answer to articles for acting as lecturer without licence. The same day he applied to the Chancellor of London in his chambers, exhibited a certificate of his election, his orders, and testimonials, and prayed a licence ; the judge took time to consider of it. On 10th May 1754, a licence was again prayed, the articles were debated and admitted. Smith's proctor gave a negative issue. On 17th May 1754, a licence was again prayed. The judge referred Smith to the bishop. On 23rd May, upon application to the bishop, he declared, as there was a cause depending, he would neither grant or refuse a licence. On 30th May 1754, Smith appeared in court, offered to subscribe the articles, &c. and prayed licence ; the judge declared he had no power to grant licences, and he would do nothing relating to it. On 31st May, Smith's proctor in-

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terposed an appeal from this grievance. The cause went on, and was heard *ex parte* on the merits of the articles on 6th December 1754, when the judge decreed a monition against Smith, not to preach or officiate as lecturer, or perform other divine service for the future in St. John's Church or elsewhere in the diocese of London, till he had first obtained a licence.—Smith appealed from the said sentence.—There are two questions, first, whether the chancellor did right in refusing to grant a licence on 30th May, and upon this point, whether he had power to grant licences; the Chancellors of London have granted two such licences within ten years last past; but supposing he has not power, the second question is, whether he did right in decreeing a monition against Smith on the 6th of December, and condemning him in costs; we insist that he should have dismissed the cause.

Dr. Pinfold, same side. — The archbishop told Smith he would grant him a licence to preach in the diocese of Canterbury, but as he had no cure there, he declined taking it.

Witnesses for Lovegrove.

1. John Norris. — Deponent knows Smith; in 1751 he officiated as lecturer for Mr. Bean at St. John's; has often heard him preach there; deponent is clerk of St. John's parish; Smith was chosen lecturer in July 1752, on the death of Bean; he performed all duties at St. John's from that time for five or six months, and then desisted till 24th March 1754, on which day he preached again there; believes he has no licence.

2. Nathaniel King. — Proves Smith's officiating at St. John's as lecturer, first for Bean in 1751,

and his being afterwards nominated lecturer in July 1752 ; deponent was then churchwarden, and insisted on his obtaining a licence ; proves his officiating as lecturer only on the next Sunday after he was chosen.

3. Ambrose Cook.—Proves his reading prayers and preaching at St. John's for Bean ; he was chosen lecturer in July 1752, on Bean's death ; on 24th March 1754, deponent did not go to church, because he heard Smith was to preach, and he did not like his character ; never heard him preach after he was chosen lecturer.

4. John Webber.—Smith was chosen lecturer in the room of Bean ; deponent has often heard Smith preach and read prayers at St. John's for Bean, before he was chosen lecturer, but has not heard him since.

Read the monition, dated 6th December 1754. “ Monished not to preach or officiate as lecturer or perform other divine service for the future in the parish church of St. John's, Wapping, in the county of Middlesex, or elsewhere in the diocese of London, without a licence first had and obtained for that purpose, under pain of the law,” &c.—The Judge condemned Smith in 15*l.* costs.

Evidence read for Smith.

Art. 3. April 1754, Bellas appeared for Smith, alleged citation, &c. exhibited his orders, certificate of his election to be lecturer, testimonials, &c. and prayed licence ; judge took time to deliberate to next court.

10th May. Bellas prayed a licence ; Townley gave articles that were debated and admitted : a negative issue was given.

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17th May. Bellas prayed a licence : the Judge referred him to the bishop.

30th May 1754. Smith, in court, exhibited three affidavits, offered to subscribe the articles, and do every thing enjoined by law, and prayed a licence. The Judge declared that the granting of licences was not in his commission, and that he apprehended he had no jurisdiction in matters of that sort, and that the prayer for a licence was improper in this cause, and that he would decree nothing in relation thereto.—Smith's proctor interposed an appeal from this refusal, but did not inhibit the Judge.

Affidavits of George Bellas and Nathaniel Bishop, gent., 21st May 1754.—Bellas swears he applied on the 20th May to the bishop for a licence, pursuant to the judge's reference on the 17th; Bishop said he would neither grant or refuse a licence, as there was a cause depending.

Affidavit of William Thompson, 28th May. — Deponent has searched the seal book of the Consistory of London; finds there a licence to the Rev. Mr. Horton to be lecturer of Hampton in Middlesex, and for the Rev. Mr. Carter to be lecturer of Barking, in Essex, both granted within ten years past; believes it is not common to require lecturers in the diocese of London to be licensed.

Affidavit of the Rev. John Smith, 28th May 1754.—Deponent was chaplain in the navy, has no benefice or estate, and has a wife and three children; deponent assisted Bean as lecturer of St. John's; about two years ago, on death of Bean, the parish intended to have chosen deponent lecturer; he applied to the bishop of London to be ordained priest,

the bishop refused to examine him ; prayed the archbishop to grant him a licence to preach ; the archbishop refused, because his predecessors had not granted provincial licences for forty years past, but he offered deponent a licence to preach in the diocese of Canterbury. On the 2nd April 1754, parishioners of St. John, in vestry, confirmed the deponent lecturer. On the 3rd April, before the deponent knew of the citation, he applied for a licence ; he was cited that day ; the bishop refused him a licence ; deponent is informed it is not the general practice in London to license lecturers ; the bishop of Winchester said he did not put his clergy to the charge of licences.

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Read.

His deacon's orders by the bishop of Llandaff, 2nd March 1734. — His priest's orders by the bishop of Norwich, 10th March, 1754. A certificate of his confirmation in vestry, as lecturer, 2nd April, 1754.— His letters testimonial of his good character and behaviour for three years past, dated the 19th April 1753, with view to priest's orders, and a licence; another, dated the 12th March 1754, in order to be licensed lecturer, signed by Mr. Bate, vicar of Deptford, and others.

Dr. Bettesworth's argument for Lovegrove.—The original prosecution was for preaching, &c. without licence ; the Chancellor cannot legally grant licences ; in the two instances mentioned, the bishop's fiat were granted. The form of ordination expressly requires a licence from the bishop himself to preach ; he is articled against for having officiated before he applied for a licence, and had obtained one, the fact is fully proved, and there-

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fore the Chancellor rightly laid him under a monition.

Dr. Hay's argument for Smith. — Every thing relating to Smith's character is material. First question, Whether the Chancellor cannot grant licences to preach. Bishop Gibson, in his Introduction to his Codex, page 23, says, "The vicar-general is *locum tenens* of the bishop, and can do all the acts of jurisdiction that the bishop can." The Chancellor then has this power as vicar-general, unless he is restrained by his patent, which he is not. He has expressly power to institute, *à fortiori*, to licence, Godolph. Repert. Can. p. 81. Canons 1640 are condemned and declared void by statute; the 11th of those canons was made to restrain chancellors from granting licences; therefore, by law they may grant them; the bishop's reference in this case to the Chancellor is a fiat; if the chancellor had power to grant a licence, he ought to have granted it, because there is no objection to Smith; he voluntarily applied for a licence before this cause began. But supposing the Chancellor's declaration on the 30th May was right, the next question is, whether his sentence on the 6th December was right. On the 24th March 1754, Smith was not lecturer, and it does not appear that he preached after he was chosen on the 2nd April 1754. Statute 13 & 14 Car. 2., none shall be a lecturer who neglects or refuses to take a licence; Smith worthy of, and desirous to take a licence, and therefore not criminous, and ought not to be admonished; the monition goes too far also in forbidding him to perform other divine service elsewhere in the diocese of London. Lindw. de Celebrat. Missar. cap. *effrænata*, verb. *curis ani-*

marum, an incumbent may appoint a temporary vicar. Otho de Instit. Vicar. cap. *ad Vicarias*. John de Othon. verb. *propriis personis*. The canons do not require a priest to be licensed to perform divine service, but only to preach.

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Dr. Pinfold, same side.—The articles are singly for preaching as lecturer at St. John's church, on the 24th March 1754, without licence, and the prayer at the end is, that he may be admonished to do so no more: power of licensing often excepted out of Chancellor's patent, which shews they have such power, if not excepted; no proof that Smith has officiated as lecturer since his election on the 2nd April, and therefore the judge was not founded in admonishing him to desist, nor ought he to forbid him to perform divine service.

Dr. Bettesworth's reply.—Citation from Gibson's Introduct. only shews that vicars-general had full powers anciently granted them when the bishops were abroad upon public affairs; a power of licensing is not given to the Chancellor of London.

JUDGMENT—SIR GEORGE LEE.

Upon the first appeal from the act of the 30th May 1754, I was of opinion, 1st, that the Chancellor of London had not power to grant a license, his commission did not give it him, and he had it not merely as vicar-general. Gibson speaks of the ancient powers granted to temporary vicars-general in the absence of the bishop, not of the powers of modern vicars-general, whose patents are for life, and who are only to be assistant to the bishop; and this appears from what he says in page 24 of his Introduction, his words are these,

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“ The power of institution was heretofore usually inserted in the commissions of chancellors, but of late days has been as usually reserved to the bishops, either by the silence of the commission as to that head, which is fully sufficient, or *in maiorem cautelam* by an express reservation.” But further, I was of opinion that the power of granting licences could not now be legally given to a chancellor, for the Statute of Uniformity, 13 & 14 Car. 2. cap. 4. sect. 19, says that lecturers shall be licensed by the archbishop of the province or bishop of the diocese (or in case the see be void) by the guardian of the spiritualities, under his seal, and shall, in the presence of the same archbishop or bishop, or guardian of the spiritualities, read the 39 Articles, &c. Now, when an act of parliament has appointed certain persons to do a certain act, no other person can do it, and this was agreeable to the desire of the bishops long before, as appears from Archbishop Abbot’s injunctions, and 11 Can. 1640. I was, therefore, clearly of opinion, that the Chancellor of London had not power to grant licences to lecturers, and in the two instances of Horton and Carter, they issued out of the chancellor’s office, pursuant to the bishop’s fiat, in which the chancellor was as much ministerial as the seal-keeper who set the seal to them.

Secondly, I thought he had rightly declared that a licence was improperly prayed in this cause, for this was a suit to punish Smith for offences he had committed, which the prosecutor had a right to go on with, though a licence should have been granted to Smith to preach for the future. I therefore thought the chancellor had done right on the 30th May.

The next question was, whether the articles

were proved. They charge that Smith preached at St. John's, and performed other divine service there, in the months of January, February, and March, 1754, and also charge any other times as shall appear from the proofs in the cause; and they pray that he may be monished not to preach and perform the office of lecturer, or do any other duties in the parish church of St. John, Wapping, or elsewhere within the diocese of London, till such time as he has obtained a licence according to law from the bishop of the diocese; four witnesses prove he many times had preached and performed divine service at St. John's church, and one witness proved particularly that he preached there on the 24th March 1754, which I thought was a sufficient proof of the facts within the general and special times laid in the articles.

The remaining question was, whether what Smith had done was an offence by law, and whether the monition had gone too far in forbidding him to perform divine service elsewhere in the diocese of London. I was clear that it was an offence; the bishop has the general superintendency of the clergy of his whole diocese, and no one could perform his clerical function there without his permission. The quotations from Lindwood and Othon do not come up to the point; Lindwood only says, that incumbents may have stipendiary curates to assist them, whose salaries shall be settled by a competent judge; and Othon says, a person who has the cure of souls may have an *adjutor mercenarius*, who may assist him *temporaliter* in the celebration of mass, &c. at his own pleasure, without licence of the bishop, but neither of them say an incumbent may be assisted by a clerk wholly unauthorised; on the contrary,

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the Canons of 1603, which relate to stranger preachers, shew that no one can preach without a licence from some bishop; and the 36th and 37th of those canons shew that a clerk cannot perform any divine service without permission of the bishop of the diocese; these canons prove not only that Smith has acted contrary to law, but also, that the monition does not go too far, for he does not appear to have ever had any licence to preach or perform divine service from any bishop whatever, or from either university, and he does not even appear to be a graduate, and his orders of deacon and priest only put him in a capacity to be authorized, but do not of themselves authorize him; and therefore upon the whole I affirmed the Chancellor of London's decrees of the 30th May and 6th December 1754, and remitted the cause with 9*l.* costs.

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TAYLOR *against* TAYLOR.

(*Appeal from Exeter.*)

A wife is not entitled to a divorce by reason of the cruelty of her husband, unless she is a person of good temper, and has always behaved well and dutifully towards him.

Jane Taylor sued her husband Thomas Taylor in the Consistory of Exeter for a divorce, for cruelty; it appeared in evidence that he was a man of very good temper, and that she was of a very bad one, and had forced her first husband to part from her; that she and Thomas Taylor often quarrelled and fought, and she often struck and abused him, and that he upon those occasions had often struck her, particularly, he gave her a kick on the shin, for which she was attended by a surgeon, who proved the fact, and that she was in danger

of a mortification, but he said it was owing to her bad habit of body ; it further appeared that he had for some months confined her to the house, but she had first escaped from him four times, and several of the witnesses swore they had often advised her to behave better to her husband, and said he was a goodnatured man, and she might live very well with him if she would ; upon this evidence, the Chancellor of Exeter dismissed the husband from the suit, and she appealed to the Arches.

ARCHEs
COURT.

Trinity Term,
June 9.

JUDGMENT—SIR GEORGE LEE.

I was of opinion a wife was not entitled to a divorce (a) for cruelty, unless it appeared she was a person of good temper, and had always behaved well and dutifully to her husband, which the appellant had not done. I therefore affirmed the sentence, and remitted the cause.

GIBSON *against* CHILD.

June 16.

John Bloss, Esq. died in May 1754 ; gave instructions for making his will, which were wrote by Joseph Newton ; among other legacies, he bequeathed in these words, “ To my cousin Ann, wife of Mr. Gibson, cousin Mary, and cousin Alice Edgar, one thousand pounds each ;” in the margin were these figures, 3000*l.* ; in the line at the end of the word “ each,” were these figures in a parenthesis, (1200) ; he appointed no executor or resi-

A legacy pro-
nounced for.

(a) See Waring v. Waring, 2 Phill. 132.

**ARCHES
COURT.**

**Trinity Term,
June 16.**

duary legatee; administration with these instructions annexed was granted to Agatha Child, one entitled to a share in the distribution of the residue; Mrs. Gibson brought a cause of legacy against her for 1200*l.*, gave in a libel, examined one witness, and had Mrs. Child's answers.

The witness, Joseph Newton, swore deceased gave him instructions for making his will, and at first directed him to set down a legacy of a thousand pounds each to Mrs. Gibson, Mary and Alice Edgar, but on reading the instructions over, deceased said he would give them 1200*l.* each, and deceased with his own hand wrote the figures (1200) at the end of the word "each"; Mrs. Child in her answers swore she believed the figures (1200) were wrote with deceased's own hand, and that he intended to give Mrs. Gibson, and Mary and Alice Edgar 1200*l.* a-piece, but as several others were entitled to share with her in the distribution of the residue, she thought she could not safely pay Mrs. Gibson a legacy of 1200*l.* without the authority of the Court.

JUDGMENT—SIR GEORGE LEE.

Upon this evidence, I pronounced a legacy of 1200*l.* to be due to Mrs. Gibson by the will of Mr. Bloss, and gave sentence accordingly.



PREROGATIVE COURT OF CANTERBURY.

MORRIS *against* DARLING.4th Session,
Trinity Term,
June 18.

Benjamin Thomas, mariner, made his will the 10th January 1746, and appointed John Boden his executor; he proved the will, made his own will and died, and appointed John Darling executor, who took probate; Ann Morris, sister of Benjamin Thomas, pretending that deceased was indebted to her the sum of 26*l.* 16*s.* 6*d.*, demanded it of Darling, which he accordingly paid to Lewis Davis, her attorney, for her use, for which he gave Darling a receipt, with promise therein to indemnify him from all costs, &c.; after this, Ann Morris cited Darling to bring to bring in the will of said Thomas, and prove it by witnesses, &c., or shew cause why probate should not be granted to her of another will; Darling appeared and brought in his will. 1st Session, Hilary Term, 1755, Fanshaw, proctor for Darling, alleged the payment of the aforesaid debt to Lewis Davis, for the use of said Morris, and exhibited Davis's receipt proved by affidavit, and prayed that Morris might be obliged to bring and leave in the registry said sum of 26*l.* 16*s.* 6*d.*, (as is done in cases of legacies received) before she should be allowed to proceed in the cause.

The Prerogative Court has no jurisdiction to enforce the payment of a debt.

PREROGATIVE
COURT.

Trinity Term,
June 18.

JUDGMENT — SIR GEORGE LEE.

But I was of opinion this was very different from the case of a legacy received, which took its only foundation from the will, which the party who received the legacy would afterwards oppose ; this money was paid as a debt by Darling, as representative *de facto* of deceased, and it being for a debt, this Court had no sort of jurisdiction over this money, and therefore I rejected Fanshaw's petition, and condemned his client in 13*s.* 4*d.* costs.

ARCHES COURT OF CANTERBURY.

By-Day after
Trinity Term,
June 28.

The sanity of a testatrix established, although a commission *de lunatico inquirendo*, had held her to be incapable from a period antecedent to the execution of the will : where a testator is in his senses, the will is read over to and approved by her, instructions are not necessary : custody disapproved.

RODD *against* LEWIS.

Dr. Hay, for Lewis. — Jane Stedman, widow, deceased, made her will 2d December 1746, appointed Humphrey Matthews and Penelope Lewis executors. Mary Rodd, spinster, niece by a sister to deceased, opposed the will in the Consistory Court of Hereford. Humphrey Matthews, who had only a legacy of 5*l.* for his trouble, renounced. Lewis propounded the will. She was the wife of William Lewis, now deceased, who was the testatrix's nephew ; deceased gave no specific legacy to Penelope Lewis, but by her will directs that what she shall get by the executorship shall be for her separate use, exclusive of her husband. Deceased died in March 1746. Lewis took probate in common form. Rodd called the executors to

prove the will by witnesses. Matthews then appeared and renounced. Deceased lodged at Lewis's house twenty years before her death. On the 2d December 1746, Mrs. Matthews, wife of Humphry, came to deceased to see her, deceased in bed; Matthews then asked Lewis if deceased had altered her will or made a new one; deceased asked what they were talking of, being told, she said she had not, but she would as soon as Mr. Lewis, Penelope's son, came back from Gloucester; that he had made a former will for her. Lewis, the father, was then sent for; deceased gave him instructions, but he is dead, so the instructions are not proved, but the will was twice read over to, and approved by, deceased, in the presence of the three subscribing witnesses; deceased eighty years old, and had a palsy; deceased desired somebody to assist her in signing her will; Mrs. Abrahall did assist her. She would not make a mark but would write her name, and then she sealed and published it; it was executed about nine at night. Rodd has pleaded incapacity for two years before deceased's death, particularly on Christmas day, 1744, and has pleaded a custody. Admit Lewis would not allow Mrs. Rodd to attend deceased, but the reason was, because she plied her with strong liquors, which intoxicated her and hurt her health. Rodd was restrained from seeing deceased from 29th of October 1746, to deceased's death. In February 1746, a commission *de lunatico inquirendo* issued out of Chancery against the deceased; the jury found her unanimously a lunatic, without lucid intervals sufficient for the government of herself and estates, and that she had been so from 26th March 1745; deceased, nor any of her friends, had no notice of the commission till the morning it was to be exe-

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COURT.

By-Day after
Trinity Term,
July 29.

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By Day after
Trinity Term,
June 23.

cuted. The commission taken out by Davis, Rodd's brother-in-law. All the commissioners strangers to deceased. We have examined deceased's physician, who swears to a recognition of this will on 18th February 1746, and to full capacity after the execution of the commission, and he is supported by the Rev. Mr. Lewis. They have objected to our witnesses, but have proved nothing against Abrahall; and as to Fisher, the other witness objected to, they have only proved that she swore upon her examination before the commissioners, what upon an interrogatory in this cause she says, she did not remember she had sworn, which will not affect her testimony. On 5th September 1754, the Chancellor of Hereford gave sentence for the will of 2d December 1746.

Dr. Pinfold, for Rodd. — Rodd was niece and next of kin to deceased. The grand question is, capacity. Deceased had great affection for Rodd. She was executrix and residuary legatee in former wills of deceased; Lewis was likewise benefited in those wills: strong custody from 29th October 1746 to deceased's death; no dispute or difference happened between deceased and Rodd; Lewis, without deceased's orders, turned Rodd out, and would not suffer her to come to deceased, though she frequently sent messages to have leave to wait on deceased. On 4th December 1746, Lewis wrote a letter, in which she said, "I have made them surrender my poor aunt to me." Will made by executrix's husband; no instructions; no previous declarations. Will wrote in the kitchen; deceased above stairs in bed. Will wholly for the benefit of the Lewis family; Rodd not named in it; made when deceased was very ill; two of the

witnesses servants to Lewis; as to capacity, deceased often did not know her niece, she fancied the parson of the parish was in love with her. He thought her mad, and therefore refused to give her the sacrament at Christmas 1744; commission of lunacy executed on 6th and 7th February 1746; deceased brought before the commissioners, and examined by them; they found she could not give answers to common questions; told them she had made no will lately, but had made one about five years before; jury unanimously returned that she was and had been insane, and incapable of managing her affairs from March 1745.

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Trinity Term,
June 23.

Witnesses for Lewis.

1. James Matthews.—One day in the beginning of December 1746, deponent went to producent's house at Ross, about nine or ten in the morning, to visit deceased, and went into her chamber, and there asked producent, if deceased had made her will, or altered her old one, as she designed to do; producent answered that she had not; deceased asked producent what deponent said; producent telling her, deceased said she had not made a new will, but would, as soon as producent's son came from Gloucester; deponent told her she believed producent's husband could do it as well; deceased said she thought not, for he had not been able to write for some time; producent said she would send and ask him; deceased desired she would do so; deceased then seemed to be of sound mind.

3. Int. Deceased for many years had a paralytic disorder, but believes it did not impair her capacity. 4. Int. Deponent never heard why Dr. Morgan refused her the sacrament.

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June 23.

1. Int. *3to loco*. Ministrant used to be a favourite of deceased's.

2. Betty Abrahall.—The 2nd December 1746, deponent was desired to go to Lewis's house to be a witness to deceased's will, deponent went about nine at night, Mr. Lewis produced a will, and read it over to deceased in presence of deponent and the other subscribing witnesses ; producent asked deceased if it was to her mind ? deceased said, "I think so ;" producent replied, that is no will at all, but if it was not to her satisfaction, desired her to speak; that it might be made to her liking ; then the said will was read a second time, and deceased said she did not know how to have it altered more to her satisfaction, and then the said will was laid before her, and a pen was put in her hand ; she attempted to write, but was not able of herself ; deponent told her she thought her mark would be sufficient, but the deceased said she would write her name at full length, and deceased desired somebody to assist her in writing her name ; deponent then held her hand ; deceased named each letter of her name, and deponent guided her hand to write each letter as she named it ; and then deceased sealed and delivered it to Penelope Lewis as her will, in presence of the witnesses subscribed ; deponent and the rest of the witnesses attested it in presence of the deceased and each other ; deceased appeared to be of sound mind ; deceased had her hat on, because the candle was troublesome to her eyes.

6. Int. The will was executed about nine at night. 7. Int. Respondent was formerly servant to deceased, and has been entertained by her since the will was made. 8. Int. Has often heard deceased speak well of Rodd ; has heard producent

say Rodd was executrix of a former will. 9. Int. Producent, in October 1746, shut Rodd out of her house, and would not suffer her to see deceased afterwards. 10. Int. Respondent did not, on her examination before the commissioners, declare that deceased was better on 6th February 1746, than she had been for a year before.

3. Eleanor Fisher. — Deponent is servant to producent; proves what passed at the execution of the will exactly the same as Abrahall; says deceased desired the persons present to be witnesses to her executing it; deceased of sound mind.

9. Int. Gives account of producent shutting Rodd out of her house. Deponent looked on deceased as capable to direct her affairs. 10. Int. Deponent did not, as she remembers, swear as interrogate at the commission of lunacy, viz. that deceased was better that day, on 6th February 1746, than she had been for a year before.

4. Sarah Smith. — Proves will was read to deceased in presence of all the witnesses; gives exactly the same account as the two last witnesses of what passed at the execution of the will; deceased of sound mind, &c.

1. Int. Deponent never thought deceased incapable of directing her affairs; her memory sometimes failed her for a little while, but she soon recollects herself. 8. Int. Rodd used to attend deceased.

Will read.

Witnesses for Rodd.

1. Walter Webb. — Within two months before deceased's death, deponent went to Lewis's house with a message from Mrs. Rodd to know whether

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she would be permitted to see deceased, but nobody would come to the door to speak to deponent; has heard deceased say she regarded Rodd as her child. 7. Int. Deceased lived twenty years with Lewis, and her husband was deceased's nephew.

2. Elizabeth Price. — Deceased was, for the most part, incapable of managing her affairs. She did not sometimes know deponent, or Mrs. Rodd; did the offices of nature without knowing it, and did not know when she was in bed; Lewis refused to let Rodd come to deceased; has heard Rodd was executrix of former wills.

4. Int. Deceased was light-headed when she did the offices of nature under her, but afterwards she grew better in her health.

3. Thomas Hardwick, parish clerk of Ross. — About half or three quarters of a year before deceased died, deponent conversed with her in the church-yard, and she then seemed disordered in her senses; Dr. Morgan sent deponent to tell her he could not give her the sacrament, because she was disordered in her senses, and he did refuse her in the church; Rodd used to attend deceased.

5. Int. Deponent knows there was a correspondence between deceased and Dr. Morgan by letters and messages, for six or seven years, in which she claimed a promise of marriage from him; deceased owned to deponent she had wrote love letters to Morgan. 7. Int. Deceased lodged at Lewis's for above twenty years.

2. Int. *2do loco.* Since Christmas 1744 Dr. Morgan's curate, by his permission, administered the sacrament at Ross church to deceased.

3. Int. Deponent went from deceased to Dr. Morgan to desire him to permit her to receive the

sacrament at Easter 1745, but he refused, saying she was a crazy wicked woman, but at that time she appeared to deponent to be sensible, and as fit as any body to receive it. 4. Int. Dr. Morgan refused to administer the sacrament to her at Christmas 1744; she retired to a pew in the church.

4. Mary Ross. — Deposes to Morgan's refusing to give deceased the sacrament, and his telling her she was disordered in her senses by the letters she sent him; says she received a letter from Penelope Lewis on 4th December 1746, in which were these words: "I have made them surrender the custody of my poor aunt to me."

4. Int. *4to loco*. Deponent once visited deceased after the 2d December 1746; ministrant was very careful of deceased; she then talked very rationally before she drank a dram, but not after.

5. Mary Webb. — Sometimes deceased talked sensibly, and sometimes not; and sometimes did not know persons, and would order her bed to be warmed when she was in it; believes she had then a fever upon her.

6. John Puckmore. — Deponent was never acquainted with deceased; deponent was a juror on the commission of lunacy, and was present on her examination, and thought her out of her senses; she said her husband had been dead fourteen years, whereas he had been dead thirty years; gives several other instances of her want of memory.

3. Int. Believes she had some lucid intervals, but not long.

7. James Clark. — Deponent only knew deceased by sight; deponent was a juror on the commission; deposes to her examination to the same purpose as the last witness, and says she told them

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she had made no will lately, but she made one about five years ago ; believes she was not in her senses.

2. Int. She appeared to be sober. 3. Int. She did not give one rational answer.

8. John Clark.—Deponent was a juror on the commission ; believes deceased was out of her senses.

2. Int. Respondent desired deceased to take time to answer questions ; repeats the questions put to her, and her answers, as the other witnesses did ; deceased was then sober. 3. Int. Does not believe she was altogether insensible.

2. Int. *tertio loco*. Believes no notice was given to deceased of the commission, or to any person on her behalf, till 6th February 1746, the day it was executed.

Witnesses for Lewis.

1. Jane Matthews. — Lewis was greatly benefited by former wills of deceased ; deponent has often conversed with deceased within two years of her death ; she was at those times in her senses, and particularly in the morning of the day the will was made ; after October 1746 deponent heard deceased say Mrs. Rodd had used her ill, and she would alter her will ; believes deceased had a very good character.

2. Int. The will to which deponent was a witness was drawn by Mr. Thomas Lewis.

2. Francis Gregory.—On 18th Feb. 1746 deponent attended deceased as a physician ; deponent asked her many questions, and she answered very rationally ; believes she was then capable of making a will, and has no reason to suspect the contrary ; deponent then asked deceased if she had made

her will ; she replied, she had made her will ; deponent said " I hope it is to your satisfaction ; " she answered it was.

8. Int. Deceased, of her own accord, expressed satisfaction in the usage she had met with from producent. 11. Int. Deceased, without direction of any person, told deponent she had made her will, and that it was to her satisfaction.

3. John Lewis, clerk. — Deponent lived in the same house with deceased till October 1745, and was again at producent's house, who is deponent's mother ; for six days in September 1746, deponent always found deceased in her senses, and thought her so in February 1746 ; deponent was present at the conversation between deceased and Dr. Gregory on the 18th February 1746, and confirms said Gregory's account thereof.

4. Eleanor Fisher. — Deponent knew deceased a year and quarter before her death ; she had her senses, except when intoxicated with liquor ; Rodd used to persuade deceased to drink spirituous liquors, and she was often fuddled thereby ; Lewis entreated Rodd not to give deceased any more strong liquors, but she continued to give them to deceased privately, and deceased drank as much as before ; deceased had a violent fever, Mrs. Lewis took great care of her ; Rodd took away the keys of deceased's drawers, and deceased, upon looking over her things, said Rodd had robbed her of her money, plate, clothes, &c.

4. Int. Deceased had a palsy in her head, sometimes did the offices of nature under her from weakness, but was sensible of it ; producent has sent deponent for cinnamon water for deceased.

6. Int. When Rodd went away in October producent bolted the door after her. 5. Int. Deponent has heard of a will prior to the present, in which

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Rodd was executrix ; believes deceased was not prevailed on by threats or otherwise to execute the will pleaded.

5. Mary Newton.—Deponent was servant to producent ; deceased used in general to talk sensibly, but sometimes talked otherwise ; **says Rodd** often sent her for aniseed water, and used to give it to deceased, which deponent believes made deceased talk irrationally.

3. Int. Deponent was a witness at the commission, and believes she might then declare that for half-a-year before, deceased was sometimes incapable and sometimes capable of managing her affairs, but believes she did not declare she was incapable on the day the commission was executed.

6. Betty Abrahall.—Deceased was impaired in her understanding by age and sickness, but continued to be of sound mind.

8. Int. After the execution of the commission deceased charged Rodd with ingratitude, and said, “If I had not made my will already I would do it yet, and if it was not secured to the Lewis's it was their own fault,” and that she would execute any other writing to secure it to them. 11. Int. At said time she appeared to be of sound and disposing mind.

7. Elizabeth Meredith Hill.—Deponent knew deceased two years before her death, and she was all that time sensible, but weak, in body ; deponent saw her once before and once after the will was executed.

4. Int. Deceased formerly intended to benefit Rodd, and made her executor and residuary legatee.

8. Mary Hill.—Deponent often conversed with deceased for two years before her death, and she was at all those times very sensible ; after Octo-

ber 1746, deceased said Mary Rodd had used her very ill, and was a Judas to her; she spoke much in praise of Lewis, and said, she would provide for her; believes deceased was sensible to her death.

3. Int. Respondent was never refused access to deceased. 4. Int. Believes deceased formerly intended to leave a share of her effects to Rodd.

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June 23.

Witnesses for Rodd on her exceptive allegation.

1. George Davis.—Betty Abrahall and Eleanor Fisher were witnesses examined on the commission against the lunacy, and Abrahall then swore she guided deceased's hand to sign the will; Fisher swore deceased was better in her senses on the day the commission was executed than she had been for a year before; deponent was a commissioner; deceased appeared to be incapable.

3. Int. *5to loco.* The commission was taken out by deponent's brother, Philip Davis, who married Rodd's sister; believes deceased made a will in 1745, and was then of sound mind; deponent was a witness to it. 7. Int. Deponent took minutes of what passed at the execution of the commission.

2. Charles Jones.—Deposes the same as to Fisher's deposition on the commission as the last witness.

1. Int. Deponent only knew deceased by sight.
1. Int. *3to loco.* Deponent has heard producent was concerned in getting the commission; the jurors unanimously signed the verdict.

3. Walter Curl.—Deceased appeared insensible when she was examined on the commission.

Dr. Hay's argument for Lewis.—The single question is, whether deceased had capacity to make a will on 2d December 1746; she declared her intention to alter her will to Matthews;

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June 23.

supposing custody, it was a misbehaviour but will not affect the will. Deceased talked insensibly when she had a fever, and when she was fuddled, but not at other times. The inquisition is not conclusive evidence ; upon doubtful evidence the jurors always make a return for a commission. It does not appear that the jury had any evidence to find deceased incapable from March 1745.

Dr. Smalbroke, same side. — The commission was secretly obtained.

Dr. Pinfold, contra, for Rodd. — I shall consider circumstances preceding and subsequent to the will ; preceding — long affection to Rodd ; no instance of her having disengaged deceased before the time that Lewis turned Rodd out of her house. The prior wills were in favour of Rodd : total exclusion of her in this carries the strongest suspicion of indirect practices. It does not appear that William Lewis saw deceased, to take instructions from her for the will ; deceased can't be supposed to have understood the general clause, giving Mrs. Lewis to her separate use what should accrue from her executorship. A verdict of a jury on a commission has great weight, *Spike against Pitt, Deleg.* The recognition on the 18th February is strong, but Gregory seems to have been sent to deceased only to talk with her about her will.

Dr. Bettsworth, same side. — If the court can give entire credit to the subscribing witnesses, there is a full proof of capacity. Deceased did not give Lewis orders to turn Rodd out of doors, or to prevent her coming to deceased. Lewis imposed on deceased as to Rodd's having used her ill.

JUDGMENT — SIR GEORGE LEE.

I was of opinion, deceased's capacity at the time of making the will was sufficiently established by Matthews, who deposes to deceased's intention of altering her will, and to her full capacity in the morning of the 2d December, and by all the subscribing witnesses, who give very minute accounts of what deceased said and did at the execution of the will; all of which shew capacity, and no material objection has been proved against any of those witnesses; they are supported by other witnesses as to her general capacity, and the recognitions after the commission put the matter out of doubt. Where a testator is in his senses, and the will is read over to and approved by him, instructions are not necessary; and I could not think this a custody, because nobody was restrained from coming to deceased but Mrs. Rodd. There was nothing to encumber this evidence but the verdict, which I could not think strong enough to set aside the positive evidence of sanity at the time of making the will. I therefore affirmed the sentence, and remitted the cause, but did not give costs.

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COURT.

By-Day after
Trinity Term,
June 28.

RILER, alias RYLER, *against* COSEN.

By-Day after
Trinity Term,
June 28.

Appeal from Norwich.

John Cosen, as occupier and lessee of the tithes of Cherry Marham, in the county of Norfolk, cited Richard Riler, a parishioner there, in a cause of subtraction of tithes. Cosen gave in a libel, and pleaded that he was entitled to the tithes

A lessee barred from recovering tithes, because his lease had been rendered void by the non-residence of the incumbent.

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June 25.

in demand, by virtue of a lease from the Rev. Mr. Chappelow, vicar of the parish of Cherry Marham, and exhibited the lease and covenant, which Riler confessed, and then gave in an allegation pleading that Chappelow had not been resident or performed the duty of the cure of the parish of Cherry Marham, but had been absent above eighty days in every year libellate, and that therefore the lease and covenant by the statutes of 13 Eliz. c. 20 14 Eliz. c. 11. and 18 Eliz. c. 11. were null and void, the court below rejected this allegation and Ryler appealed.

I was of opinion the allegation ought to have been admitted, and pronounced for the appeal. The proctor for Ryler repeated the allegation and examined two witnesses, to prove that Chappelow had been non-resident contrary to the statutes, in every year libellate, and Cosen did not offer any plea to shew that Chappelow had any legal excuse within those statutes for non-residence.

Witnesses for Ryler.

1. Rev. Mr. Cosen. — Deponent is curate to Chappelow, at Cherry Marham; Chappelow has not for ten years past been resident there, and has done no duty except preaching twice or thrice in a year, but has absented himself for above eighty days in every year for ten years past, and lives at Dis.

2. Robert Good. — From 1746 to 1752, Chappelow has not been resident at Marham, but has absented himself above eighty days in every year.

Dr. Pinfold, for Ryler. — (The cause standing to be heard) insisted that this absence of the lessor was a preliminary point which barred the suit, and ought to be first determined.

JUDGMENT — SIR GEORGE LEE.

I was of that opinion, and having heard the two depositions above stated read, and him for Ryler, and Dr. Simpson for Cosen, I was of opinion that the lease to Cosen was void, pursuant to statute 13 Eliz. c. 20. by the non-residence of the lessor, and consequently that Cosen (who had no title but under the lease) had no right to bring this suit, and dismissed Ryler with 30*l.* costs.

ARCHES
COURT.By-Day after
Trinity Term,
June 25.ROWLAND *against* JONES.

June 25.

Appeal from St. David's.

Dr. Simpson, for Thomas Jones.—28th August 1753, Jones promoted articles at St. David's against the Rev. Mr. Rowland, curate or vicar of Landovy, for neglect of duty and immoralities. He gave a negative issue. The promoter examined several witnesses, but Rowland did not plead. On 23d October 1754, the Judge, by interlocutory, decreed him to be suspended for twelve months. Constant drunkenness fully proved.

A clergyman
suspended for
drunkenness.

Dr. Harris, for Rowland.—The prosecution is founded on the 76th canon (a); Rowland has not

(a) Probably a clerical mistake for the 75th canon, which is as follows; “ No ecclesiastical person shall at any time other than for their honest necessities, resort to any taverns or alehouses; neither shall they board or lodge in any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking or riot, spending their time idly by day or by night, playing at dice, cards, or tables, or any other unlawful games; but at all times convenient they shall hear or read somewhat of the holy Scriptures, or shall occupy themselves with some other

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pleaded, but relies on his cross-examination ; the drunkenness the witnesses depose to in the desk at church, was three years before the prosecution ; Mr. Herbert Lloyd is the principal promoter, and he is a witness in the cause. The sentence of suspension is irregular ; ten witnesses were examined by the promoter, who proved Rowland was drunk on several days particularly mentioned, and also that he lived in a constant habitual state of drunkenness. Dr. Harris, for Rowland, said he should chiefly insist on the errors in the proceedings ; in the citation, Rowland is only styled clerk, in the articles vicar, by the witnesses curate, and in the interlocutory he is suspended by the name of the respondent, and the interlocutory suspends him generally without saying whether *ab officio* or *à beneficio*, or from both.

JUDGMENT—SIR GEORGE LEE.

I was of opinion that the general term “suspension,” without any additional words, always meant suspension *ab officio* only ; as to the description of Mr. Rowland, I did not think it material in this case, he having joined issue, and the identity of the person being certain, and as the charge of drunkenness in the articles was very fully proved, I affirmed the decree of the judge below, and remitted the cause, with 15*l.* costs.

honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the church of God ; having always in mind that they ought to excel all others in purity of life, and should be examples to the people to live well and christianly, under pain of ecclesiastical censures, to be inflicted with severity, according to the qualities of their offences.”

PREROGATIVE COURT OF CANTERBURY.

BRADDYLL, formerly JEHEN, *against JEHEN.*By-Day after
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Dr. Simpson, for Mr. Young Jehen. — John Jehen deceased died the 28th August 1751, made his will, dated the 18th October 1749 ; afterwards on the 24th February 1749-50, married Grace Hanson ; in October 1750 she was delivered of a dead child, but after deceased's death on the 2nd January 1751-2, she was delivered of a daughter ; deceased left at his death, besides his wife and this posthumous child, a mother and Mr. Young Jehen, his brother, and a sister married to Mr. Baker ; the posthumous child died in April 1752. This suit commenced in June 1752. Pending this suit, viz. in 1753, Mrs. Jehen, the deceased's widow, married Mr. Braddyll ; Young Jehen was appointed executor of the will, she cited him to prove it by witnesses, &c. ; he appeared and propounded it ; she pleaded that it was revoked by the testator's subsequent marriage and birth of a child, and also pleaded affection to her, and declarations, &c. that the deceased did not intend the will should subsist. On the contrary, Jehen pleaded deceased's intention that it should stand as his will, and recognitions of it, the deceased had a real estate of 42*l.* a year, and a reversionary estate of 50*l.* a year after his mother's death, and a personal estate of near 3,000*l.* ; this will wholly relates to personal estate ; the real estate is in gavelkind, by which tenure the widow is entitled during her

Marriage and
the birth of a
child are a pre-
sumptive revo-
cation of a will.

In order to
revive a will
made before
marriage and
the birth of is-
sue, there must
be a republica-
tion, or some
express declar-
ation which will
amount to a re-
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widowhood to a moiety of deceased's whole real estate ; the deceased was about 18 years old when he made the will ; he gives thereby a third part to trustees for his mother for life, and then to his brother Young Jehen, another third to him, and the remaining third to trustees for the separate use of his sister Baker ; there is full proof of the *factum* and execution of the will, and that deceased made it voluntarily ; deceased recognized it in 1749, had great affection for his relations, his affection to his wife is doubtful ; deceased knew his wife was with child ; she and her family knew he had a will, and had it by him ; deceased's father and grandfather did not leave their estates at the disposal of their wives, he approved of their conduct, and said he would not leave his estate to his wife, which declaration he made the winter after his marriage ; she expressing dissatisfaction thereat, he told her she would have half his real estate ; the last year of his life he often said he should not live long ; he declared to his mother it was imprudent not to have a will by her ; he was in a bad state of health, and in expectation of death ; even William Hanson their principal witness owns he was in an indifferent state of health, but on his second examination he retracts. Exceptions to Hanson and Martha Stopford, from their swearing he was in good health, when by letters it appears they knew the contrary ; by agreement between Grace and Young Jehen she has 21*l.* a-year out of deceased's gavelkind estate. Hanson and Stopford depose, that deceased said a short time before his death, that he would leave all to his wife ; Stopford has sworn she never declared she heard deceased say that he had a will, the contrary is proved against her ; deceased had frequent opportunities of

making a new will; recognition in November 1750; in presence of his mother and wife, he declared he had made his will, and secured his sister's share from her husband; in March or April 1751, declared the same again, and said "Hanson has my will;" the witnesses say they believe he intended this will should stand, notwithstanding his marriage and his wife being with child; marriage and birth of children, without other circumstances, is not a revocation; if it has been revoked, it is revived again by recognition.

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Dr. Hay, for Braddyll.—The widow prays administration to the deceased as dying intestate; this is opposed by the brother who has propounded a will dated 18th October 1749, in which he is executor. I agree the dates are rightly stated. That the deceased had great affection for his wife appears from his letters to her; the will was not in deceased's custody after execution, it was kept by Hanson. The first question is, whether a marriage and birth of a child subsequent to a will, is not by law a revocation? Declarations only support the presumption of law. A widow by tenure in gavelkind loses her share if she marries. She has therefore now no sort of provision, for that is lost by her second marriage.

Admitted the will was duly executed, and Brown, a witness to it, says it was left in deceased's hands at the time of execution.

Witnesses for Braddyll.

1. William Hanson, dry salter.—Deponent is brother to producent; knew deceased three or four years before his death; Grace married deceased 24th February 1749-50; she was delivered about eight or nine months after of a dead child;

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deceased died in August 1751; in January 1752, producent was delivered of a daughter named Elizabeth.

12. Int. About a month, or six weeks, or two months before deceased died, he told deponent that some time before his marriage he had made his will at the request of his mother and brother, but that as he was now married and his wife with child, he was determined to make a new will, and he would leave all he could to his said wife and child, and desired respondent to go with him to Mr. Nuttall, respondent's attorney; respondent said he would go with him at any time; deceased said as he was under age, and had some freehold and some leasehold estates, and some money on mortgage, and in the stocks, and as he was not in possession, he could not tell what he had to leave, but that when he went to Canterbury he would bring up his old will, which he said was in the hands of one Mr. Hanson, an attorney there, and that would serve him to make a new will by, but deceased never afterwards went to Canterbury; he never said any thing else to respondent concerning his will, except that about half or three quarters of a year before, he said to respondent that his relations were all provided for, and he would leave his wife all he had, and believes he was at Canterbury after said last declarations once or twice, and staid a fortnight at a time, and that producent was with him the last time; believes deceased had his health better at Canterbury than in Southwark; does not believe he was in a declining state of health at that time. 13. Int. Deceased had a freehold estate of 43*l.* a year; he had 100*l.* fortune with his wife.

2. **Martha Stopford.**—Deponent knew deceased

about five years ; producent and deceased married in February 1749-50 ; she had a dead child ; producent far gone with child at deceased's death, and she was afterwards delivered of a daughter.

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11. Int. Deponent was told deceased had a will, but does not know by whom ; deponent heard deceased say within six weeks before his death, that he would make his will and give all he had to his wife ; deponent did not at any time before or after deceased's death acknowledge in the presence of any one, that she had heard deceased say he had made a will.

Elizabeth and William Bridges examined by Braddyll, but read to interrogatories by Jehen's counsel.

3. Elizabeth Bridges. — 3. and 4. Int. Believes deceased to his death well knew and remembered he had made the will pleaded, and that he considered it as his will, and he twice declared to respondent that he had made his will ; the first time was in November after his marriage, when he said to respondent, who was his mother, "I wonder you won't make your will and settle your affairs, for if you should die Baker will have my sister Sally's share ; for my part I have made mine, and taken care Baker shall have nothing of mine ;" the other time was about Christmas following, when his wife was present, and he then said to respondent, "I wonder you won't make your will, you won't die the sooner if you make it ; if you don't make one, Baker will have Sally's share ; I have made mine, and taken care he shall have nothing of mine."

5. Int. At said times deceased advised her to leave to his sister as he had done, separate from

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her husband, respondent thereby understood that he intended his will should operate; the posthumous child died in April 1752. 6. Int. Believes deceased well knew his wife was with child before her miscarriage, and that she was with child at his death, and when he was at Canterbury the last time, he got green fruit for her, which she was fond of. 7. Int. The end of July or beginning of August 1751, he said at Mr. Hanson's house, in deponent's presence, to his wife, "You have not spoke to my mother;" respondent asking about what, he said, "She knows;" respondent soon after went down stairs, and Grace and Miss Stopford came also down; respondent asked Grace what her husband wanted her to speak to deponent about, she said, to ask her advice, whether she should be blooded, and Grace then told respondent she had been quick with child about a fortnight. 8. Int. Deceased was seldom well after his marriage, he went to Canterbury twice for his health; the first time he went at Christmas and staid five weeks, and the last time he went with his wife in May 1751, and staid eight weeks, and was very ill. 10. Int. Deceased, has in presence of his wife, said, that women were not fit to be trusted with money to give to another husband, and said, he would not leave what he had, at the disposal of his wife or any woman in the world; he had 100*l.* with his wife.

4. William Bridges.—Int. 3. and 4. in November 1750, deceased declared he had made his will and secured his sister's share; believes he intended his will should subsist; to the other interrogatories deposes the same as the last witness.

9. Int. Deceased, in June 1751, offered Baker a wager that his, deceased's, wife would be brought

to bed before Baker's. 10. Int. The Christmas after his marriage, deceased declared no woman should have the disposal of his estate.

5. James Clark.—Deceased made his addresses to his wife three or four months before his marriage.

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Witnesses for Braddyll on another allegation.

1. William Hanson.—Deceased and producent were very fond of each other, and continued so to his death; she, during her widowhood, had only 21*l.* a year out of deceased's gavelkind estate; deponent is a subscribing witness to a deed between producent and young Jehen about said estate; deceased's personal estate was about 2,300*l.*

2. Martha Stopford.—Proves affection between deceased and producent, which continued most strongly to his death; and about two hours before he died, he desired the deponent to send the producent to him to bed.

3. John Stokes, gent.—In 1748 deponent came to know deceased; he shewed great love for producent, and particularly in his last illness.

4. George Crawford, gent.—Deponent is attorney for producent; proves deed of assignment of moiety of gavelkind estate by young Jehen to producent; the said moiety is forfeited by her second marriage.

Witnesses for Jehen.

1. William Bridges.—Deceased left a mother, who is deponent's wife, a brother and a sister, for whom he had great affection to his death; deceased was in possession of a gavelkind estate of 42*l.* a year, and a reversion of 50*l.* a year after his mother's death; believes he intended the will

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should operate ; proves same declaration in November 1750, as he proved on interrogatories before, viz. that deceased had made his will, &c. ; he was in a declining state of health, and went several times to Canterbury for his health ; deceased sensible to the last ; he knew his wife was with child at his death ; witness deposes to same effect as he deposed to the interrogatories ; deceased and Grace had sometimes quarrels ; does not know the will was ever in deceased's custody.

N.B. The citation in this cause issued 28th April 1752.

2. Elizabeth Bridges. — Proves the same as the last witness ; deceased and Grace acquainted about five years before his death ; believes he intended his will should stand ; deposes to his declarations, that he had a will, &c. ; the same as upon interrogatories ; deceased was taken very ill about the 20th April 1751, and afterwards went to Canterbury for two months ; he knew his wife was with child when he died ; said his wife should never have the disposal of his estate to wrong his family ; deceased and Grace often quarrelled ; believes he repented of his marriage.

7. Int. Believes the will was always in Hanson's custody.

3. George Baker. — Deponent married deceased's sister ; he had the greatest affection for his relations ; deceased very ill in April 1751, and came to Canterbury, was then in a very bad state of health ; deponent is sure deceased knew his wife was with child ; he used to say a man was in the wrong who left his fortune to his wife's disposal to buy her another husband ; deceased and Grace often quarrelled ; believes he made the will freely.

4. Samuel Furrier. — Deceased had affection for his relations ; in October, or beginning of November 1749 deceased said to deponent that he had made his will and settled his affairs.

5. Susan Wyburn. — Deponent was grandmother to deceased ; he had great affection for his relations ; had only 100/. fortune with his wife ; deceased knew his wife was with child when he died ; deceased was taken ill in April 1751, and came to Canterbury in May following ; deceased sensible to his death ; the last time he went to Canterbury he said there, that he had done a foolish thing in marrying, and said his family would not suffer by it, and that he would not leave his estate to any wife from his children.

6. John Haywood.—Proves value of deceased's estate.

7. William Wyburn.—Proves deceased's affection to his relations.

6. Int. Deceased was about eighteen when he made his will ; believes he made it freely. 14. Int. Believes deceased was in good health after he returned from Canterbury the last time.

8. Mary Cartwright. — Deceased and his wife often quarrelled.

9. James Hanson, gent. — Deponent before the will was made received a letter from deceased, with instructions for making his will ; deponent drew it, and sent it to him.

7. Int. The will was wrote by Brown, deponent's clerk, and some time after the execution it was sent to deponent sealed up.

Witnesses for Braddyll.

1. William Hanson. — Deposes to affection between deceased and producent ; deceased returned

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to London in July 1751 with his wife, and he then seemed be in perfect health, and believes he continued so till about the 10th August 1751, when he went to Norfolk, and got cold ; deponent did not see him after till the day he died.

6. Int. Does not know, believe, or has heard that deceased had a slight fever at any time, except in April 1751. 7. Int. Deponent asked Dr. Fothergill what deceased's illness was, and what he died of ? he said, " of a mortification." 12. Int: Martha Stopford lives with deponent as house-keeper. 16. Int. Deponent frequently saw deceased in July 1751, and he seemed to be in good health. 17. Int. Deceased was not for six weeks before his death in a declining state of health. 20. Int. Deceased was very ill in April 1751. 22. Int. Deceased had a cold, but never heard he had a fever after he returned from Norfolk.

2. William Kindleside, apothecary.—Deponent was apothecary to deceased, was sent for on the 26th April 1751, and attended him till the 3rd May, it was a slight illness which confined him till the 3rd May, when he was quite recovered ; believes he then went to Canterbury ; deponent never saw him after till the 22nd August 1751, and then he had a fever, occasioned by a cold and an indisposition in his bowels, and he then told deponent he had been in Norfolk ; deponent attended him on the 25th August, he was then much better, but worse on the 26th, and in the evening of the 29th he grew very bad ; Dr. Fothergill was sent for, but deceased died about twelve o'clock that night ; deponent thinks he died of a mortification in his bowels ; on the 22nd August deceased did not appear to be in danger of death ; deponent

did not think him in danger till the evening of the 27th August.

6. Int. Deponent never heard of deceased being ill but in April and August 1751; deponent thought it best for deceased to go to Canterbury in May 1751.

3. Elizabeth Royle. — Deceased and Grace seemed very fond of each other.

6. Int. Deponent heard Grace say deceased was weakly, and has heard he had disorders on him twelve months before he died.

4. Martha Stopford. — Proves affection to Grace; on the 20th April 1751, deceased was taken ill of a fever and cold, and in May he went to Canterbury; he returned very well, and the day before he went to Norfolk he walked with his wife and deponent to Greenwich and back again; after he returned from Norfolk he complained he had got a cold in said journey, and a stiffness in his neck; believes he died of a mortification; the apothecary declared he thought him in no danger, and he said the same in the afternoon of the day deceased died; about a fortnight before he went to Norfolk, deponent heard him say to producent, "Do not be uneasy, my dear, for I will leave you all I have."

6. Int. Has heard he had a slow fever in April 1751. 8, 9, 10. Int. Deponent was at the races at Canterbury, in September 1752, and talked with Mr. Bridges about this cause, and he said they had offered Grace 700/. to make up the cause; does not remember she then declared that she heard deceased say he had made his will, or any thing to that effect. 11. Int. Never declared to any such effect to Baker. 17. Int. Does not know deceased was ill when he went to Norfolk; he went seem-

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ingly quite well. 20. Int. Producent's brother, Henry Hanson, was present when deceased declared he would leave producent all he had.

5. John Stokes.—Deceased seemed to be pretty well when he last returned from Canterbury, believes he continued so till he went to Norfolk, and the night before he seemed to be very well; he returned home ill with a cold and a stiff neck; believes the cold turned to a mortification; the day before he died his apothecary said he did not think him in danger.

6. Ralph Royle.—Deceased and his wife behaved very affectionately to each other.

Several letters from deceased to his wife, written from the 2nd July 1750 to the 15th August 1751 inclusive, were read, which expressed the strongest affection for her.

Witnesses for Jehen.

1. William Bridges.—Deceased often talked of his death; believes it arose from his ill state of health; has often heard him say it was imprudent for any man to neglect making his will; deceased commended his father for not leaving his estate at his wife's disposal, Grace was present, and said, "I find then you will leave me nothing," he replied, "You know you will have half my real estate, die when I will." Grace said to deponent that she had frequently heard deceased say he had made his will, and particularly when the cause was beginning she said, "We all know there was a will, my Jackey told me he had made his will." Martha Stopford, in 1752, at Canterbury, said to deponent, "We all know there was a will, for I have heard Mr. Jehen say several times after his marriage that he had made his

will," deponent said, "if he intended to alter his will in favor of his wife, it was a pity he had not done it;" she replied, "You know he was a close, reserved man, and would say nothing of his affairs, and I never heard him say he would alter his will."

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2. George Baker. — Has often heard deceased say, he believed he should not live long; has often heard him blame people for not making their wills; Grace told deponent she knew there was a will; believes he had frequent opportunities of destroying or altering his will; he was several times at Canterbury; the two last times he was in a very bad state of health; in August 1752, Martha Stopford said, she knew nothing of deceased's affairs, for latterly he had no liking to her, and never heard him say whether he would or would not leave anything to his wife, or say anything about the disposition of his estate.

3. Elizabeth Bridges. — Deceased often talked of his death, and that he should not live long; he often pressed deponent to make her will, and said it was imprudent in every body not to make their wills; in March or April 1751, deceased, in Grace's presence, said he would never leave any woman what he had, to buy her another husband, Grace said, "Then you will leave me nothing;" he said, "Yes, you will have half my estate;" Grace said, she had often heard deceased say he had made the will pleaded; in March or April 1751, deceased, in presence of his wife, said, "I have made my will," deponent asked where it was, he replied, "Mr. Hanson has got and keeps it now."

4. Ann Herritage. — Proves deceased coming several times after his marriage to Canterbury, and that the two last times he was very ill.

5. James Hanson. — The will was kept in de-

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ponent's custody, and was sent him soon after the execution; deceased never sent for it from deponent.

6. Catherine Sladden.—The last time deceased was at Canterbury, he said to deponent he should not live long.

7. Mary Cartwright. — Deceased was ill when he came last to Canterbury.

Several letters from deceased and his wife to his relations, dated from 30th April 1751, to his death, were read to shew he was all that time in a bad state of health.

A letter from William Hanson to Young Jehen, dated 5th September 1751, was read to affect Hanson's testimony, in which he says, deceased died of a slow fever, and a mortification in his bowels.

Read for Braddyll.

David Henriques.—1. and 2. Int. Respondent is a subscribing witness to the deed of assignment to Grace from Jehen; William Hanson was present at the execution.

Theodore Darling. — 3. Int. William Hanson was present at execution of said deed of assignment.

George Crawford. — William Hanson is a man of very good credit, and is esteemed a very honest man; the deed of assignment was executed in presence of said Hanson and deponent, and they were going to witness it, but being told Mr. Jehen had named witnesses they forebore.

Six witnesses gave William Hanson a very good character.

Read the will. The deceased divides his personal estate into three parts; gives one-third to trustees for his mother, Mrs. Bridges, for life, to her sepa-

rate use, and then to his brother, Young Jehen; gives another third in trust for his sister Sarah Baker, for her sole use, exclusive of her husband, and after her death to her children; and the remaining third to his brother, Young Jehen, and makes him executor.

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Dr. Simpson's argument for Jehen. — Several points: 1st, That marriage and birth of a child alone is not a revocation of a will: 2dly, That there are not in this case circumstances to adduce a revocation: 3dly, That there are contrary circumstances: 4thly, There are recognitions which will revive the will, if it was revoked. The statute of frauds does not extend to this case. The civil law binds no further than as it is received; though the Roman law does void a will by marriage and birth of a child, the law of England does not. The Roman law does not bind here, because it is not received; in all the former cases where wills have been set aside, there has been something more than marriage with issue. Every man may dispose of his personal estate as he pleases; deceased's not altering his will gives presumption that he resolved it should operate; he must be sensible of the change of his state. To revoke a will, a change of mind as well as of circumstances, must appear; no evidence of intention to revoke, the will was complete and executed; the wife has 21*l.* a-year in land, and a reversion of 25*l.* a-year: deceased did not act to shew that he had any view that the will should not operate. The question is not, whether this will is just, but whether it was the deceased's intention. The case of *Gray and Altham* (a), at the Council Board, is not similar to this case. *Croke Eliz.* 721, *Coward* and

(a) *Gray v. Altham*, cited in *Johnston v. Johnston*, 1 *Phil.* 485.

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Marshall, a man devises land to his son, and then marries again, and makes another will, and gives those lands to his wife. The Court held the latter will was not a revocation of the former. *Salk.* 234. 235, *Cole and Rawlinson* (a), Holt said intention of a testator is to be collected from the words of the will, not from the circumstances of the testator. Marriage alone, it is admitted, does not revoke a will, *Prerogative*, 1722, *Slade's* case, nor children alone. *Deleg.* 1734, *Ward and Phillips* (b), if a man displeased with his son, makes a will, and disinherits him, after is reconciled, and dies, the will is good. A will is not revoked from the hardship of a case. *Swin.* part 7. s. 15. no man is presumed to have revoked his will, unless it appears to be his intention. Marriage and birth of a child is not an implied revocation, but only creates a presumption of intention. Whenever a revocation is implied, something must be done inconsistent with the will. In all the cases where wills have been set aside by marriage and birth of a child, there have been inceptions of wills. In *Lugg and Lugg* (c), there was a will not executed, deceased

(a) In *Cole v. Rawlinson*, Powys, Powell and Gould, justices, differed from Holt, C. J., and the judgment was given according to the opinion of the puisne judges. This judgment was afterwards affirmed by the House of Lords, 1 Bro. Ca. Parl. 108. See on this point, 1 Ves. 232; Rep. T. Talb. 202; Bro. Ca. Ch. 472; 2 Atk. 450. See also *Powell on Devises*, 540. Vi. 4 T. R. 601.

(b) *Ward v. Phillips*, specially referred to in *Shepherd v. Shepherd*, 5 T. R. and in *Johnston v. Johnston*, 1 Phill. 482. The case is styled in the Assignment Book of the Delegates, *Ward* otherwise *Phillips v. Phillips* and others. The Judges Delegate present at the sentence were, Mr. Justice Denton, Mr. Baron Carter, Mr. Baron Thompson, Dr. Strahan, Dr. Audley, Dr. Islan and Dr. Cottrell.

(c) The case as reported in *Salkeld*, is as follows. Before a Commission of Delegates. One being single made his will, and devised all his personal property of J. S.; afterwards he married and had several children, and died without other will or disposi-

declared he had no will a week before his death. *Overbury's* case was not determined upon marriage and birth of a child only, there was a latter will, for administration with a schedule annexed was granted. *Meredith* and *Meredith* the same: there, likewise administration was granted with a latter will; no act done by deceased to revoke this will; declarations only that he would make a will, which will not revoke; it appears from the evidence that deceased had apprehensions of death, had opportunities of making a will, but did not, therefore it must be supposed he intended this should subsist; all deceased's letters to his wife, I confess, do shew affection, but all except three were wrote before the recognitions. When did this will first stand revoked? At the marriage or at the birth of the dead child, or at the procreation, or birth of the posthumous child? When deceased was at Canterbury, in May 1751, he was ill, his wife with child, and the will there; then he would have made a new will, if he had intended it; marriage and the birth of a child alone do not revoke, declarations do not revoke, on the contrary, there has been a revival by his declarations that he had made his will, &c

Dr. Bettesworth, same side.—We admit marriage and issue is a strong circumstance, but it produces presumption only. A *femme coverta*'s will is revoked by marriage, because she becomes incapable to make a will. *Swinb.* 7 part, s. 17. does not men-

tion. And now *coram Delegatis*, of which *Treby, C. J.* was one, it was ruled that there being such an alteration in his estate and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind. 2 *Salk.* 593.

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tion marriage, &c. where he speaks of revocations. Menoch, de *Presumpt.* Lib. *quest.* 31. nu. 2. *presumptio tollitur per contrariam probationem.* It seems probable that he had his marriage in view when he made his will. *Domat.* b. 3. tit. 1. sect. 5. 6. *agnatio hæredis rumpit testamentum*, because it is presumed the testator was prevented from altering his will by death. *Eyre and Eyre*, testator lived long abroad, will left in England, presumed to be forgotten. *Mantica de Conject.* b. 12. tit. 1. s. 12. when testator can, and does not alter his will, he is presumed to intend it shall stand. Menoch, de *Presumpt.*, b. 4. nu. 13. the same. If a child is born after a will is made, the will is good if the testator might have destroyed it, but did not; the word he uses is *convalescit*. The deceased does not mention a word of making a will in any of his affectionate letters. In *Barker and Pusey's* case, *Prerog.* there was a marriage settlement inconsistent with the will, and a mortgage, which was a revocation *pro tanto*. *Croke Jam.* 497, a revocation must be in express words of the present tense. *Hanson's* evidence shews deceased did not think his will was revoked by law, he therefore must have looked on it as a subsisting will; he could not have wanted his old will to make a new one, to give all to his wife and child. Full proof of a revival. 1 *Vernon*, 330, *Hall and Dunch*, a slight evidence will do for a republication. *Roll's Abridgment*, 604, case of *French and Montague*, if a man declares his will shall stand after it has been revoked, it is a good will. 2 *Vernon*, 209, testator said his will was in his box, this was held to be a republication. 3 *Keble*, a will is not revoked by every act that may appear contradictory to it.

Dr. Hay's argument for *Braddyll*. — The will

was made before deceased had a view to his marriage. Courtship began on 29th October 1749; will dated 18th October 1749. The first question, is, whether the will of a bachelor is vitiated by marriage with issue? The second, supposing it to be revoked, whether enough has been done by the testator to revive it? The will solely relates to personal estate. Statute of frauds does not extend to this case; it is not a settled point what alteration of circumstances will revoke. *Barrow and Bunker*, 1695, held that marriage and birth of a child does revoke a will. *Williamson and Blakesley*, Prerog. 1751, marriage alone does not revoke, but the Judge said in that cause that marriage with issue does. Chan. 27th January 1748, *Parsons and Lanoe*: Colonel Lanoe made a will 10th June 1732; he was then married, for he gave his lands to his wife in case he died in Ireland, whither he was then going; he returned; had issue, a son and daughter after his return, died in 1738, leaving that will, he mentioned it as his will a short time before his death. First question, whether it was a conditional will? Second, whether the issue, born after making it, revoked the will? Several cases quoted on that occasion; Deleg. 1741, *Coombe and Coombe*; *Beresford's* case, and *Meggott and Meggott's* case. Lord Chancellor said it was a conditional devise, and therefore void by the testator's return. On the second question he said, that as to the personal estate, the case of *Lugg and Lugg*, in the Deleg. is an express authority, that a will is void by subsequent marriage with issue, and that the Statute of frauds did not relate to that case, and added, that no liberal construction was to be made in favor of that will. Domat. b. 3. tit. 1. sect. 5. s. 6. the revocation in consequence of marriage and issue is founded on the law of nature,

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by which a man is bound to provide for his child. 2 Shower's Rep. *Overbury's* case, the reporter says, by the opinion of the civilians, marriage and birth of a child voided a will; marriage, with issue, is a revocation *presumptione juris*. 1 Peere Williams, 304, *Cook and Oakly*, Sir John Trevor held marriage and issue to be a revocation of a will for lands. *Meredith and Meredith*, Prerog. 1711, deceased made a will in 1708, fully complete, married in 1709, and had issue; he began a new will, gave his wife a specific legacy or two; first will held to be revoked, and administration with the schedule granted to the widow. Eq. Cas. Abridg. 413. *Brown and Thompson*. Second question, whether this presumed revocation is rebutted by a revival of this will by declarations; his declarations, that he had a will, were only made to induce his mother to make her will.

Dr. Smalbroke, same side.—*Eyre and Eyre's* case strong with us. The circumstance of affection to wife material. Prerog. *Joddrell* and *Crop's* case cited with respect to uncertainty of declarations.

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I said the civil law did not bind, but as it was received; and where it was received, it became part of the law of England; the only evidence of its being received was usage, which must be proved from the practice and determinations of Courts. That marriage, with issue, subsequent to a will for personal estate, is a revocation of the will, seemed to me to be a settled point, not only from the cases cited, but also from those of *Brown* and *Preston*, and of *Outram* and *Outram*, in the Prerog.; and Dr. Bettesworth clearly held it to be so in the case of *Barker and Pusey*, which was

the latest determination. I was therefore of opinion that this will was revoked by Mr. Jehen's subsequent marriage and birth of a child alive. Secondly, I was of opinion this will was not revived. In the case of *Lewis and Bulkeley* (a), Delegates, 1732, Mrs. Hampton made her will when sole, then married, became a widow, and died leaving that will uncancelled. She made many declarations that she had her will by her, told the contents of it, and spoke of it as her will a very short time before her death, but the whole Court held, that the will was revoked by her marriage, and that it could not be revived without republication, or some express declaration that would amount to a republication. I thought the same reasoning would hold in the present case (b), and as

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(a) *Vid. Vol. I. pp. 513 and 190 notis*, and *Burns E. L. 51.*

(b) The soundness of this decision has been confirmed by a variety of subsequent cases determined in different Courts, and the principle of the civil law on this branch of testamentary law may now be considered as incorporated with the law of England. The case of *Wells v. Wilson*, at the Cockpit, on an appeal from the West Indies, was decided principally on this ground. In 1770, Lord Camden sent the case of *Shepherd v. Shepherd*, (reported in the notes of 5 Durnford and East, p. 51.) to be tried before Dr. Hay, then Judge of the Prerogative Court, to ascertain the extent of the principle adopted by the civil law in cases of this description. In the case of *Doe* on the demise of *Lancashire v. Lancashire*, Lord Kenyon, after much argument, held, that marriage, and the birth of a posthumous child, amounted to an implied revocation of a will of lands made before marriage, and the puisne judges of the King's Bench were concurrent with him in this judgment. 5 Durnf. & East, 49. In 1817, Sir John Nicholl, Judge of the Prerogative Court in the case of *Johnston v. Johnston*, carried the principle further than any of his predecessors, by holding that the birth of children, combined with other circumstances, might amount to the revocation of a will of a married man. This decision, however, rests on his sole authority, for the case was not appealed to the Delegates. *Johnston v. Johnston*, 1 Phill. 447.

The cases which bear upon this subject, are *Lugg v. Lugg*,

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this will was revoked by law, it could not be revived without a republication, or some express declaration, that the testator would have this paper operate as his will, notwithstanding his marriage and his wife's being with child, but as nothing more was proved than obiter declarations, that he had made his will, and that it was in Hanson's hands, and those declarations were not made with a view to revive the will, I was of opinion they were not sufficient to revive it, and therefore pronounced against the will, and that the deceased was dead intestate, and decreed administration to the widow, but did not give costs.

June 25.

REYNOLDS, Administrator of WHITE, *against*
WHITE.

An executed
will held not to
be revoked by
an unexecuted
schedule of a
later date.

John White, Esq. deceased made his will, dated the 29th March 1747, containing a complete disposition of his real and personal estate, and made his brother Thomas White executor, and duly executed it in presence of three witnesses; this paper is marked A., on 20th July 1747 he made an inception of a will only, marked C., on 10th February 1748-9 he wrote with his own hand a paper marked B., which contains a disposition of his real and personal estate, appoints his said

Salk. 592; 1 Lord Raymond, 441; 1 Wils. 243. *Earl of Lincoln's case*, 1 Eq. Ca. Abr. 411. *Pollen v. Hubrail*, *ibid.* 412. *Brown v. Thompson*, *ibid.* 413. *Parsons v. Lanoe*, 1 Ves. 191. and Ambl. 559; 4 Burr. 2171. n. *Brady v. Cubitt*, *Dougl.* 31. *Christopher v. Christopher*, in 1771, in the Exchequer. *Kenebel v. Scrafton*, 2 East, 550. *Ex parte Lord Ilchester*, 7 Ves. jun. 348. *Emerson v. Boville*, before Sir William Wynne, in 1802, 1 Phill. 342. *Hollway v. Clarke*, *ibid.* 339. *Wright v. Sarmuda*, 2 Phill. n. 266. *Gibbens v. Cross*, 2 Add. 455. *Talbot v. Talbot*, 1 Hagg. 710.

brother, Thomas White, executor and residuary legatee, and inserts a clause of revocation of all former wills; this paper is unexecuted, and there is no signature to it; the testator died in the beginning of April 1749; on the 5th May 1749, Thomas White took probate of the executed will, and acted under it till 1752, when the schedule B. was found amongst a heap of papers; in 1754, Thomas White cited deceased's widow, and all the legatees in the executed will to shew cause why the probate of that will should not be declared void, and a new one should not be granted to him of schedule B., the deceased's widow and the legatees in the first will opposed schedule B.; Thomas White propounded it; pending the suit he died, and Reynolds took administration to him, and by virtue thereof prayed administration to John White, with the schedule B. annexed; on the other hand, John White's widow (as the executor named in the will A. was dead, and the residue was not devised,) prayed administration, with the will marked A. annexed; there were no declarations or circumstances in support of schedule B.

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Upon hearing the cause, I was clearly of opinion that as schedule B. was unexecuted, and therefore could not operate for the real estate, and was unsupported by any circumstances, it was not a good will for the personal estate, and therefore pronounced against schedule B. with costs, and decreed administration *de bonis non*, with the will A. to the widow of John White, the testator, there being no residuary legatee named in that will, and the executor being dead.

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A next of kin
condemned in
costs for having
pleaded insanity
in a testator, and
failed to establish it.

STRATTON and STRATTON *against* FORD.

John Stratton died in June 1754, made his will the 6th May 1752, and a codicil of the same date ; appointed his wife Susanna Stratton, John Stratton, and William Ford executors, and gave to Mary Ford, mother of said William, a legacy of 1500*l.* ; on the 28th March 1754, he made a second codicil, in which he revoked the legacy of 1500*l.* to Mary Ford ; she entered caveat against proving the second codicil, as cousin-german, and one of the next of kin, and as a legatee in 1500*l.* in the will, which legacy is revoked by said second codicil, the caveat was warned, she declared she did not oppose the will or first codicil, but opposed the second codicil. Susanna Stratton and John Stratton propounded the second codicil, but William Ford would not join with them therein ; Mrs. Ford pleaded total incapacity in the testator at the time of making the second codicil, and examined six witnesses on her plea, all of whom fully proved sanity, except the apothecary, who swore strongly to insanity ; Ford's counsel admitted that the testator's sanity and the second codicil were sufficiently proved, but contended that Mrs. Ford ought not to be condemned in costs, because she was one of the next of kin, and the apothecary had proved insanity.

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But as she had not been content with putting the executors to prove the second codicil, but had pleaded insanity, by which she had given them a great deal of trouble, and put them to expense,

and her own witnesses had proved contrary to her PREROGATIVE COURT.
plea, I was of opinion she was liable to costs, and
to prevent vexatious suits, I condemned her in By-Day after
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costs accordingly.

ARCHES COURT OF CANTERBURY.

RANDALL and HORDON, on behalf of themselves
and others, Parishioners and Inhabitants of
Chelsea, in Middlesex, *against* COLLINS and
LUDLOW.

June 30.

Appeal from the Consistory of London.

Dr. Pinfold, for Collins and Ludlow. — The question is, whether a faculty shall be granted for erecting an organ in the west gallery of Chelsea church. The parishioners by a voluntary subscription raised 143*l.* for purchasing an organ, which they put up in 1745, without authority, for which reason it was in 1746 pulled down again by order of Dr. Andrew, then Chancellor of London; but on the 5th October 1752, a vestry met on previous notice, and it was then unanimously agreed to apply for a faculty to put up an organ by voluntary subscription, and not at the parish expense. Collins and Ludlow, two parishioners, were appointed to apply for such faculty, who have petitioned accordingly, and have taken out a citation, with intimation. The organ is six feet wide, and four feet deep; it is proposed to set it at the back part of

An application
for the grant
of a faculty to
erect an organ
in a parish
church refused.

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the gallery at the west end of the church ; the inhabitants have subscribed 20*l.* a-year to keep the organ in repair, and to pay the organist. Randall and Hordon opposed granting the faculty, on suggestion that many of the parishioners will be displaced to set up the organ, and also that it will bring a perpetual expense on the parish. On the 13th December 1754, the Chancellor of London decreed a faculty, from which Randall and Hordon have appealed.

Dr. Hay, for the appellants.—The citation issued on 17th October 1752, recited a voluntary subscription for an organ, and an agreement in vestry that it should be no expense to the parish. Twenty-three parishioners met at this vestry on 6th October 1752; the minister and churchwardens were cited in special, and all others in general, to shew cause, &c. but there was no specification of the dimensions of the organ in the original citation, which we insisted, made it void ; but the objection was overruled. Notice was given in the church for a vestry, to agree to apply for a faculty to fix an organ in Chelsea church, by a voluntary subscription, and not at the parish expence. Randall and Hordon insisted that it should be no expense to the parish in present, or in future. The respondents alleged that it was proposed to set it up behind the pews in the West gallery, were no one sat. After the suit was begun a subscription was made for 20*l.* a year to pay the organist, &c., none have subscribed more than five shillings a quarter each, and most have subscribed only one shilling. Sixty-four parishioners, who pay at the rate of 140*l.* a-year, rent, have signed a paper, marked No. 1. desiring a faculty may not be granted.

The parishioners will want room. The church was built in 1669, the parish is greatly increased of late years. In 1684, there were only 164 houses and 820 inhabitants in the parish. Upon a survey in 1750, which was reported to the vestry in 1751, it appeared that there were 658 houses and 3290 inhabitants. In 1698, the church would not hold half the inhabitants, and therefore a faculty was prayed, and granted, for erecting a gallery on the south side of the church. By the Pew Book it appears, there is a difference made between sittings and fixed seats; only 393 persons can be accommodated with certain seats. In the west gallery there are twelve pews, of which two pews must be entirely destroyed, and near half of three more; our objection is want of room in the church for the parishioners, and that it will be a future expence to the parish, which we have proved. The Chancellor decreed a faculty, and condemned Randall and Hordon in 50*l.* costs. There was originally no organ in this church; on the 8th November 1745, application was first made to the then Chancellor for a faculty to erect an organ, it was opposed, and the Court refused it. In 1746, Ludlow, who was then churchwarden, put up an organ without a faculty, he was articled against, and Dr. Andrews ordered it to be taken down, and condemned him in 7*l.* 10*s.* costs.

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Witnesses for Randall and Hordon.

1. William Wallace.—Knows the parish of Chelsea, lives near it, and has known it from his infancy, the parish is large, and is greatly increased; in 1751, there was a talk of rebuilding or enlarging the church; there are twelve pews in the West gallery, two of which run back into the steeple;

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sixty people may sit in the said pews, many persons will be greatly incommoded by the organ, and many sittings lost; believes it will perpetuate an expence on the parish; the church is not large enough to contain near the number of parishioners.

2. James Tully.—Deponent lives in the Five-fields, in the parish of St. George, Hanover Square; deponent well knows the parish of Chelsea; it is greatly increased, and is very large, and many new houses have been built; deponent has often been at Chelsea church; in 1751, there was a talk of rebuilding the church; six weeks ago deponent took a view of the west gallery, it contains twelve pews, four go under the steeple, they will hold sixty people; several pews must be destroyed to put up the organ, and it must cause a future expence; the church will not hold the parishioners.

3. John Clark.—Deponent lives in the parish of Kensington; well knows the parish of Chelsea; on 11th May 1754, deponent viewed the West gallery, the place proposed for the organ contains seven pews, and will well hold thirty-four persons, who must lose their places if an organ is put up.

4. Hermannus Van Geen, carpenter.—Deponent lives at Kensington; the parish of Chelsea is greatly increased; on 11th May 1754, deponent took a view of the place where an organ is proposed to be fixed, it contains seven pews, which will hold thirty-four persons; it will incommod the whole gallery, and will totally exclude those who sit in the seven pews; the church will not contain the inhabitants.

5. John Holmes, gent.—Deponent has lived in Chelsea thirty-five years, and been vestry clerk of that parish twenty-nine years; it is a very large parish, and is greatly increased in houses and in-

habitants; the deponent was present at vestry on 2d August 1751, when a report was made by a committee appointed by vestry on 19th July 1751, to consider of rebuilding or enlarging the church, and to enquire into the number of houses and inhabitants in the parish, when they reported that in 1684, there were 164 houses; by the Vestry Book, No. 1. it appears that in 1698, the inhabitants obtained a faculty for erecting a gallery on the south side of the church. At said vestry, on 2d August 1751, said committee reported that the church was built in 1669, and in 1684, there were 164 houses assessed, and in 1750, there were 658 houses assessed, and allowing five persons to a house in 1684, there were only 820 inhabitants; and in 1750, there being 658 houses, at the same proportion there must be 3,290 inhabitants; this rule of calculation was confirmed by the difference of the baptisms and burials in 1669 and 1750; in 1669, only fifty burials, and in 1750, there were 225; the baptisms in 1669 were only thirty-four, and in 1750, 121. On 5th October 1752, the vestry came to no agreement where the organ should be placed, though deponent believes it was talked of placing it over the west gallery. On the said 5th October 1752, a question was put in vestry, that the subscribers should have leave to apply for a faculty at their own charge without any expence to the parish, and it was unanimously agreed to; the subscribers to the organ have, as deponent believes, raised 143*l.* 5*s.* and have bought an organ, and believes it was intended to pay the organist by a voluntary subscription without any expence to the parish.

6. William Horrod, of Chelsea. — The parish is large, and the inhabitants have increased; the west gallery to the best of his remembrance, contains

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eight pews; an organ must be a general inconvenience to persons seated in the west gallery, and must exclude many; the church is always very full, and is small in proportion to the inhabitants.

Collins' and Ludlow's allegation.

1. Art. The organ contains six feet in width, and four feet in depth; notice given for holding a vestry to apply for a faculty to fix an organ in the west gallery by a voluntary subscription, and not at the parish expense.

5. Art. An annual voluntary subscription is raised of 20*l.* a-year, to pay an organist and keep the organ in repair, and the subscribers are desirous the faculty should be granted under these restrictions.

Exhibits read. Vestry Book, No. 7.

2d August 1751, entry of report from the committee of the number of houses and inhabitants.

Vestry, 29th March 1698; entry recites that there is not room in the church for half the inhabitants; therefore, agree to pray a faculty for erecting a gallery on the south side of the church.

Witnesses for Collins and Ludlow.

1. John Holmes.—The parishioners have bought an organ by voluntary subscription. On 5th October 1752, it was unanimously agreed by the parish officers and others, that a faculty should be prayed to erect an organ by voluntary subscription; believes there were formerly great houses in Chelsea, which have been pulled down, and several small ones erected; at vestry, in 1751, it was agreed that it was not necessary to enlarge the church; at the vestry, 7th November 1751, the meeting was so

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numerous that they were forced to adjourn into the church, and there it was carried not to enlarge the church, &c. There are three chapels in the parish of Chelsea, one belongs to the hospital, another to Chelsea park, which is a chapel of ease to the parish church of Chelsea, and the other is a French chapel. Several of the inhabitants go to Chelsea park chapel, the hospital chapel belongs only to the officers, &c. of the hospital, some houses are inhabited by Moravians, who have a chapel of their own ; there are many dissenters in said parish, but deponent cannot tell the number ; cannot say whether there is or is not room in the church for the inhabitants ; Randall is seated in the pew marked No. 22, and believes Hordon is seated in No. 18.

4. Int. Respondent has no seat allotted to him or his family ; he applied in 1754 to the church-warden to be seated, and was told to look out for a seat he liked, but respondent has not applied since, and he never wanted a seat when he went to the church. 10. Int. Some of the annual subscribers are lodgers in the parish, but most are parishioners and housekeepers. 12. Int. Randall has several houses in Chelsea.

2. Richard Bridge. — Deponent built an organ and put it up in 1745 under an arch in the back part of the west gallery, behind some pews, which is a very convenient place for an organ ; about a year after it was taken down again by order of the churchwardens ; at a vestry, in 1752, it was agreed to apply for a faculty to erect an organ ; 20*l.* a-year is sufficient to pay an organist and keep the organ in repair.

2. Int. The middle part of two long pews was taken away to erect the organ.

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3. John Lott.—The deponent measured the place where the organ stood, and found it would not displace above nine persons, it being only six feet in depth, and four feet in width ; there is a very proper place in the west gallery for an organ.

4. Hugh Cocks, organist.—20*l.* a-year is sufficient to pay the organist and keep the organ in repair ; deponent has agreed to play it for 15*l.* a-year, has heard of the subscription for an annual payment of 20*l.* a-year, the subscribers agree to pay quarterly the sums set against their respective names.

N.B. The highest subscription is five shillings, and the lowest one shilling a-quarter. The church contains sitting-places, as appears by the free-book, for only 393 persons.

Witnesses for Randall and Horden.

1. Charles Turner.—Proves the plan of the church ; the west gallery is full of pews, there is no void space in it but the passage, which is not more than two feet six inches wide, and the entrance is through the belfry ; the steeple wall projects into some of the pews ; several pews must be destroyed to erect an organ.

2. John Souch.—Proves the plan of the church, and that several pews must be destroyed to set up an organ.

3. William Wallace.—There is no void place in the west gallery, for it is full of pews ; Thomas Miller, one of the subscribers to the annual payment, has left Chelsea, and William Hunt, and Elizabeth Doody are dead ; the chapel in Chelsea park, and the French chapel are, as deponent has heard, private property ; many persons, servants and others stand and kneel in the place designed for an organ.

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4. James Tully.—There is no void place in the west gallery; Randall's brother sits in said gallery; Hunt is dead.

5. John Clark.—No void space in the west gallery; many pews must be destroyed to erect an organ.

6. Hermannus Van Geen.—The same; does not think the church will hold more than 400 persons; believes some go to the chapels because there is not room in the church.

7. John Holmes.—The same; cannot say whether the organ will be inconvenient; John Tokelove, a subscriber to the annual payment is marked "poor" in the parish books; several subscribers are dead, or have left the parish, others are lodgers, the chancel belongs to the rector only, there are private chapels on each side of the chancel which are let out by the owners, the parishioners have no right to pews but those named in the pew-book; the chapel in Chelsea Park is the property of the rector of Chelsea, who has let it to another minister, who lets it out; parishioners have no right to seats in any of the chapels but by paying for them; believes many of the parishioners have no seats allotted them, but does not know any person has been refused a seat.

1. Int. It does not appear that any persons are seated in the pews marked 61 and 62. 12. Int. Believes some of Chelsea parish go to Hanover-square chapel. 16. Int. Collins and Ludlow applied for the faculty, pursuant to the order of vestry; deponent never saw the church so full as that the parishioners were obliged to go up to the west gallery.

8. William Horrod.—The west gallery is quite full of pews; several must be destroyed to make

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way for an organ. Same as the other witnesses ; servants generally sit in the back seats of the west gallery, who must be displaced if an organ is put there.

Exhibit No. 1. dated in 1753, a declaration signed by 64 parishioners, who are rated to the parish taxes at upwards of 1400*l.* a-year rent, that they desire a faculty may not be granted.

Dr. Pinfold, for Collins and Ludlow.—We admit that an organ is not necessary by law ; application for a faculty was made by the unanimous consent of the whole vestry in October 1752. The Court cannot take notice of the exhibit No. 1. because it was not the act of a vestry, but a private subscription ; Randall and Hordon are the only parishioners who oppose, and they have no private interest, for they do not sit in the west gallery ; no one who sits in the gallery opposes ; no evidence that the future expense will be too great for the parish to bear ; when the organ was up it was not prejudicial to the parish ; it was pulled down only because it was put up without a faculty.

Dr. Bettsworth, same side.—No proof that any one who wanted could not get a seat in the church. There must be more than room, for several of the witnesses who are strangers have gone to this church.

Dr. Hay, for Randall and Hordon.—The consent of vestry is conditional, that the organ should never be an expence to the parish. No fund is provided ; even the subscription for the annual payment began after the cause was commenced. It

is an old church not built for an organ. It is a parish church in which there is no choir.

Dr. Smalbroke, same side.—In 1747, articles were exhibited against Ludlow for erecting this organ and the west gallery. The gallery was allowed to stand, but the organ was ordered to be taken down, which shews the organ was then thought prejudicial to the church. The original citation in this case is null, for want of setting forth the dimensions of the organ. Many persons have a possessory right in the west gallery, who must be turned out if the organ is put up.

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I was of opinion that an organ was unnecessary in all churches, and in this would be inconvenient, for it clearly appeared that the church was too small for the number of inhabitants, and would be made less by taking away several seats to make way for an organ. As to the annual subscription, I thought it merely nominal; several of the subscribers were already dead or removed, and perhaps their successors would not subscribe, but after the organ was set up by virtue of a faculty it must be supported, and consequently would become a burthen to the parish. It appeared to me that Dr. Andrew, in 1747, thought it prejudicial, for otherwise, though it was set up illegally, he might have granted a faculty to have confirmed it. Randall and Hordon, as parishioners, had a right to oppose (a). I thought a faculty ought not to be

(a) See *Butterworth and Barber v. Walker and Waterhouse*, 3 Burr. p. 1689; *The Churchwardens against The Parishioners, Vicar, and Inhabitants of St. John's, Margate*, 1 Hagg. C. R. 198; and *Prideaux's Directions to Churchwardens*, p. 34.

granted, and reversed the Chancellor's decree, but without costs.

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FITZGERALD against LADY MARY FITZGERALD,
his wife.

Witnesses allowed to be produced on interrogatories, a requisition having issued for the examination of witnesses without formal notice to the adverse proctor.

In this cause, Mr. Farrar, proctor, for Lady Mary, prayed a requisition to Ireland, to examine witnesses on an allegation of faculties. Mr. Gostling, proctor, for Mr. Fitzgerald, was present in Court when the requisition was prayed and decreed, but Mr. Farrar took it out under seal without giving Mr. Gostling notice to annex interrogatories, upon which Gostling moved to suppress the depositions; the register and proctors agreed that it was the constant practice to give notice, when the requisition is to be taken under seal, to the adverse proctor, notwithstanding he was present when it was decreed. I therefore ordered that these witnesses should be examined on interrogatories if Mr. Fitzgerald thought fit. Gostling prayed that Lady Mary should bring them to be examined.

JUDGMENT—SIR GEORGE LEE.

But in this case, where the husband by law is to pay the whole expenses, and Mr. Fitzgerald had stood in contempt and never yet had paid any costs that had been taxed against him, I ordered that in case Mr. Gostling would lodge in the Registry 50*l.* to pay the expense of the examination, by a day certain, Mr. Farrar should take out the requisition, and bring the witnesses to be examined; otherwise that Gostling should be at liberty to take out a requisition if he thought proper.

PREROGATIVE COURT OF CANTERBURY.

BITTLESTON, by her Guardian, *against* CLARK. July 3.

Dr. Simpson, for Ann Clark. — John Clark, deceased, made his widow executrix, the will was dated 26th February 1750, he died 27th February 1750; gives a leasehold estate to his wife for life, remainder to Peter Donde, his wife's son, he paying annuities thereout, of ten pounds a year to each of his two sisters, to his nephew Thomas Bittleston, twenty pounds. Wife residuary legatee. Will attested by three witnesses. Testator's mark to it. Proved in common form. 2d March 1750, executrix cited to prove the will by witnesses, by his niece and one of his next of kin, Elizabeth Bittleston, or to shew cause why deceased should not be declared to have died intestate. On 25th Feb. 1750, deceased was suddenly seized with a fit as he was walking in his garden, which deprived him of his speech and affected his senses. Some months before, he gave instructions to Mr. Green, an attorney, to make his will, he accordingly from those instructions made a draft of a will which he read to deceased, and he approved it, and desired it might be engrossed, and at that time ordered the blank, left for a legacy to his nephew, Thomas Bittleston, to be filled up with twenty pounds. Three weeks before his death he sent to Green to bring him the will to execute. He

A case of incapacity established.

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COURT.
July 8. made many declarations as to his will. Bittleston's family had greatly disengaged deceased. Soon after he was seized with the fit, Mrs. Clark sent to Green for the will. It was executed the next morning when deceased was calm. Two of the subscribing witnesses are persons of character. Batten, who was present, but is since dead, guided deceased's hand to make a mark; deceased was speechless, but sensible, as appeared by his behaviour. Ricketts, one of the subscribing witnesses, swears to incapacity, contrary to his attestation. Clark has propounded the will, and pleaded the instructions and draft as circumstances in support of it.

Dr. Hay, for Elizabeth Bittleston. — My client is niece to deceased by a sister. Deceased left a widow and this niece, and her brother, Thomas Bittleston (who, if living, is abroad) his only next of kin. The niece is a minor, and acts by George Bittleston, her father and guardian. Deceased's intention and affection are not very material in this case, because the single question is, whether deceased had capacity to execute a will on 26th February 1750; deceased was entirely speechless from the time he was seized with the fit. The instructions pleaded are agreeable to the will, they are not dated, but Green says they were given many months before deceased's death. The draft is dated 26th February 1750, the same day as the will. I shall not, in this case, controvert deceased's intention to make a will. Ricketts, one of the subscribing witnesses, says, deceased was entirely incapable; the other two speak to appearance of capacity. The apothecary says, deceased was senseless

when he saw him, but he might have intervals. It PREROGATIVE COURT.
is not pretended that he was capable of reading the
will or publishing it, and it was not read to him.

July 3.

Witnesses for Clarke.

1. John Dutton. — Deponent knew deceased sixteen years; in the afternoon of 26th February 1750, deponent, being sent for, went with William Stokes to deceased's house; they found in the room with him, deceased's widow, one Batten, and John Ricketts; Batten carried the will to deceased, and told him it was his will and he must make his mark; Batten put a pen in his hand, which deceased seemed to take willingly; Batten held deceased's wrist, and he so made his mark; Batten put a seal on the wax; deceased took it off, and then deponent, Stokes, and Ricketts, witnessed the will at desire of Mrs. Clarke and Batten; deceased speechless, but deponent believes he was perfectly sensible, by reason of the willingness with which he seemed to take the pen, and by making his mark and taking off the seal, and because when deponent was going away he desired deceased to give him his hand, and deceased directly turned his hand towards deponent's.

1. Int. Respondent is brother to Ann Clark, the widow, and owes her 100/. which he cannot pay. 8. Int. Cannot tell whether Green, the nurse, was in the room when the will was executed or not; Ann Clark desired deceased to sign the will, and Batten told him he must sign it, and deceased held out his hand for a pen, and believes deceased well understood what he did. 9. Int. Respondent cannot swear deceased was sensible, but believes he was.

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The counsel for Bittleston admitted that the death, good character, and handwriting of William Stokes, one of the subscribing witnesses, were sufficiently proved.

3. John Ricketts, miller, read for Bittleston.— Deponent was servant to deceased ; on 25th February 1750, deceased was seized with a fit in his garden, and never spoke afterwards ; Mrs. Clarke, sent her son, Peter Donde, to Mr. Green for deceased's will for him to sign ; when Donde came home, he said he had staid at Green's a good while for the will was not finished ; between ten and eleven in the morning of 26th February 1750, deponent being with deceased, Dutton, Stokes, and Batten came into deceased's room, and then Mrs. Clark took a will out of her bosom and laid it on a book before deceased, and bid deponent hold him up ; she said to deceased, "Pray my dear set your name to it," but deceased took no notice and did not offer to take the pen ; she then said to Batten, "I see he can't do it, you must help him ;" Batten put the pen in his hand and made the letter I, and said it would do, but she said, it was not enough, and then Batten guided his hand to make the letter C, and then Dutton, Stokes, and deponent, by Mrs. Clarke's direction, attested the will ; it was not read to deceased ; he had not capacity to make a will ; took no notice of any body.

4. George Green, attorney, read for Clark.— Deponent knew deceased twenty years, and was his attorney ; many months before his death, deceased called on deponent, and desired him to make his will ; he gave deponent verbal instructions ; deponent took them down in writing, and gave them to his clerk to draw a will ; some time

afterwards, but cannot tell the time, deceased called on deponent, and deponent then read said draft to him; when deceased gave the instructions he ordered a blank to be left for the sum to be given to Thomas Bittleston, he being undetermined as to the sum, but when the draft was read to him, deceased said he would give him only twenty pounds; deponent then in deceased's presence inserted 20*l.* in the blank; verily believes said draft was entirely to deceased's mind, he approved of it, and desired deponent to get it engrossed, and said he would call on deponent to execute it; deceased was then of sound mind, &c.; deponent caused the will pleaded to be wrote fair from said draft, and it is in every respect agreeable to said draft so read over to the deceased the deponent having compared said draft and will; deceased never came to deponent afterwards; on the 26th February, the will was sent for.

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2. Int. Believes he has heard deceased was sensible to his death.

5. Dutton Greenwood.—To 5th interrogatory, believes Mrs. Clark sent for Charles Cadmore to shave deceased's head after the fit, in order to lay on a blister, and deceased did not speak, but believes he was sensible.

Will read.

Witnesses for Bittleston.

1. Vincent Mawre, apothecary.—Knew deceased fifteen years; was his apothecary; in the afternoon of the 25th February, deponent being sent for went to deceased's house, and found him speechless and senseless; deponent bled him; he did not then know what was done to him; on

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July 8.

the 26th February deponent attended him, and found him in a stupid, senseless condition ; deponent said he would lay a blister on his head, for if anything would bring him to his senses that would ; believes Cadmore, the barber shaved his head and the blister was laid on ; deponent saw him afterwards ; did not find it had restored him to any sense whatever ; whenever deponent saw him he did not appear to have any sense, and when deponent was with him he was not capable of making a will ; but cannot tell whether he had intervals when deponent was not there ; deceased when in health wrote a good hand.

1. Int. Has several times heard deceased say he had given instructions to Green to make a will in favour of his wife. 2. Int. Heard him say he would leave what he had to his wife, for his relations had greatly disengaged him. 7. Int. Has heard deceased refused to see the Bittlestons. 10. Int. Has heard deceased spoke to his daughter-in-law after he was seized with the fit.

2. Mary Hewitt. — On the 26th February, deponent hearing deceased had a fit, went to his house and saw him, he was then in strong convulsions, and seemed quite senseless, and next day deponent heard he was in the same condition.

3. Mary Pidgeon. — Deponent was servant to deceased at his death ; has heard him express great love for the Bittlestons, and expressed dislike to his wife ; he had a fit on the 25th February ; from that time to his death he seemed totally insensible ; deponent was present when he was bled ; he shewed no signs of sense ; next day Mrs. Clark desired Mawre to shake him, which he did, but deceased seemed quite senseless ; proves Mrs. Clark sent Donde to Mr. Green's, and

he brought home a paper; Mawre ordered a blister to be laid on deceased's head, but it had no effect, and he remained all the said 25th February entirely senseless; in the morning of the 26th February, Batten was at deceased's house; does not believe deceased was ever in his senses after said fit; he wrote a good hand when he was well.

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4. Charles Cadmore, barber.—Deponent was barber to deceased; in the morning of the 26th February, deponent went to deceased to shave his head; deceased took no notice of deponent, and seemed entirely senseless.

5. Elizabeth Green.—Well knew deceased; attended him as his nurse in his last illness; he had been blooded before deponent came; on the 26th February, Mawre was with deceased, and desired him to point where his pain was; deceased lifted up his hand, but Mawre did not shake him; deceased was in great agony when his head was shaving; after his blister he seemed more composed, and would not take anything but from his wife; about 10 or 11 in the morning of the 26th February, deponent fomented his belly with brandy, and he seemed displeased; believes he was not quite insensible when he was not in agony; Batten came in soon after said fomentation, and deponent went down; deceased seemed composed at that time.

8. Int. Thomas Bittleston greatly disengaged deceased, and he sent him to sea. 5. Int. Deceased declared he would leave him nothing.

6. Int. Heard he sent a common soldier to the East Indies; deceased would not see Elizabeth Bittleston, or her father.

6. John Sidcoe.—Has known deceased twenty-five years; deponent has been told by Elizabeth

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July 2.

Green that deceased never appeared to have any sense or spoke after his fit.

7. Sarah Sidcoe.—Same as to Green's declaration, and has heard the same from deceased's other servants.

8. John Allen.—Knew deceased fourteen years; proves that he fell down in a fit in his garden in the afternoon of 25th February; when he was first seized, he called out, "Allen, Allen;" and deponent ran to him, he was carried into his house, and he once or twice called out "Nanny" and "Jenny," but said nothing else; deponent sat up with deceased that night, and he was sometimes composed and sometimes in agonies; deponent saw deceased several times on 26th February; he would take things from his wife which he refused from others; believes, though he was speechless, he was not totally incapable.

1. Int. Within six months of his death, deponent has heard deceased say, he had given Green instructions for a will in favour of his wife. 2. Int. Declared he would leave all to his wife. 3. Int. Thomas Bittleston greatly disengaged deceased, and deceased sent him to sea. 5. Int. Has heard he ran away from his ship; has heard deceased say he never would see him again. 7. Int. Five or six months before his death, deceased refused to see George Bittleston and his daughter, and refused to lend said George five guineas. 10. Int. Deceased, after his fit, called "Nanny" and "Jenny," the names of his daughters-in-law.

9. James Waterman.—Deponent has frequently heard deceased express affection to Thomas Bittleston, and said he should be his heir, and he said so a month before his death; Cadmore told de-

uent deceased was not sensible when he shaved his head.

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July 3.

Witnesses for Clark.

1. Benjamin Horn, a quaker.—About a month before deceased's death he told the affirmant he had given Green instructions for his will ; three weeks before his death, deceased desired affirmant to call at Green's and ask if he had done his will, which affirmant did, and further knows not ; believes Thomas Bittleston disengaged deceased, and he sent him to sea ; he ran away, and entered himself a common soldier in the India Company's service ; deceased did not intend the Bittlestons should have his effects.

2. Vincent Mawre, apothecary.—Deceased told deponent he had given orders for his will to be made in favour of his wife ; had great disaffection to the Bittlestons, and would not see them.

3. John Allen.—The same as to deceased's declaration about his will and disaffection to the Bittlestons, and deceased ordered George Bittleston and his daughter Elizabeth to be turned out of his house.

4. Richard Harden.—Says deceased was disengaged by the Bittlestons, and said they should have nothing of his.

5. George Green.—Deponent wrote the instructions for deceased's will in his presence ; sets forth the contents of them ; paper marked A, is said paper of instructions ; proves the paper marked B, to be a draft of a will made from said instructions.

The counsel agreed that the instructions and draft are agreeable to the will pleaded.

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Dr. Simpson, for Clark.—Affection to his wife is clear from the instructions ; deceased had an intention to die testate ; will for personal estate need not be wrote or signed by the testator, his intention only is to be regarded ; delay of execution will not affect this case, because deceased died suddenly ; no circumstance to shew he had departed from his intention ; full and legal proof of execution ; he had capacity sufficient to know he was executing his will ; *Jewkes and Parmenter*, and *Tate and Mildmay*, Deleg. ; in both cases, witnesses not believed who swear against their own acts. Prerogative, 30th April 1755, *Caryll against Knight*, will pronounced for where the evidence of capacity was as slight as this.

Dr. Bettsworth, same side.—If deceased had died without this paper being brought to him, the draft would have been a good will ; deceased died in 1750, at this distance of time it is more difficult to prove instances of sanity. Skinner's Reports, *Hudson's case*, and *Dix's case*, witnesses deposing contrary to their own act, committed. Ricketts says Mrs. Clark desired deceased to sign the will, she therefore thought him sensible.

Dr. Hay, contrà, for Bittleston.—The paper is propounded as a paper duly executed ; the question is, whether the paper propounded is the deceased's will, and was duly executed ; they should rather have propounded the draft ; the fact of execution is fully proved, but whether the deceased had a capacity to do that act at that time is the question ; though a man swears against his own act, he is to be believed if he is supported by circumstances and other witnesses, the draft cannot

be pronounced for in this case, because it is not propounded ; but if it had been propounded, it could not have been established as a will.

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Dr. Pinfold, same side. — They have specially pleaded that the will was read over to deceased on the 26th February, and that deceased was then in his senses and duly executed it ; these facts are not proved ; deceased bid Horne ask Green for the will, but he did not say he would execute it ; deceased did not know the contents of this executed paper.

JUDGMENT — SIR GEORGE LEE.

Though I thought it was clear that the deceased intended to die testate, and to leave his estate to his widow, in the manner it is done by the will in question ; yet as the instructions and draft were introduced only as circumstances in the cause, but not propounded, and the executrix had taken upon her to prove that the executed paper was the deceased's legal act, that was the only matter in issue ; and I could take notice of the draft only as a piece of evidence, and could only determine whether the executed paper was the legal act of the deceased or not, which depended on another question, whether on the 26th February 1750, deceased had capacity enough to know what he did, and to understand that he was executing his will ; and I thought from the whole tenor of the evidence on both sides that he was not sufficiently sensible to be capable of making and executing a will, and without such capacity, though his mark was set to the paper by the guidance of Batten and a seal was taken off the wax, so that there was a mechanical execution, yet it was not deceased's legal voluntary act, and therefore could not be pro-

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COURT.**

July 3.

nounced for as his will ; for which reason I pronounced against the validity of the will propounded, and that so far as appeared to me, the deceased was dead intestate, but did not give costs.

Caveat Day,
July 8.

TAYLOR against TAYLOR.

*A party con-
demned in the
costs retardati
processus.*

Hughes had long been assigned to give an allegation, which he neglected ; at last he delivered one into Court, but had not given the adverse proctor a copy, as he had been assigned to do ; it was then appointed to be debated the next Court, upon which day he pretended he did not know the adverse proctor would oppose it, upon which it was put off to this day, and now he suggested that the allegation was very imperfect, prayed leave to subduct it, and time to Michaelmas term to give in a complete allegation, and Dr. Bettesworth, his counsel, informing the Court that he had seen heads of such allegation and thought it would be material, I condemned Hughes's client in 3*l. 6s. 8d.* costs *retardati processus*, and assigned to hear upon the admission of the allegation the first day of next Michaelmas term, provided such costs were paid, and a copy of the allegation delivered to the adverse proctor by the caveat day in September next, otherwise the cause to be then concluded, and allowed him to subduct his allegation.

PREROGATIVE
COURT.GASCOYNE *against* CHANDLER.Caveat Day,
July 3.

Dr. Bettesworth, for Chandler.—Sabine Chandler, Esq. deceased, died in February 1750, made a will, but appointed no executor or residuary legatee, he left Mary Chandler his widow, George Chandler, and Sarah, now the wife of Joseph Gascoyne, Esq., his children. Mary, the widow, and Sarah, the daughter, were the only legatees in the will, or schedule. In May 1750 they appeared and renounced administration *cum testamento annexo*, is not barred thereby from contesting the validity of a will.

Where the validity of testamentary papers is contested in the Court of probate, the Lord Chancellor always stays proceedings in his Court till that validity is determined upon.

12th February 1754 Sarah Gascoyne and her husband filed a bill in Chancery against George and Mary Chandler, prayed a discovery of assets, payment of her legacy under the will, and distribution of the rest of deceased's estate; defendants gave their answer to the bill, and then Sarah Gascoyne cited said George Chandler to bring the letters of administration into this court to prove the will by witnesses, or to shew cause why he should not be pronounced to have died intestate, and why administration should not be granted to her. She renounced both as daughter and legatee, and thereby affirmed the will, and she has likewise affirmed it in Chancery, where a suit is now depending; and she cannot legally proceed in both courts; and therefore Mr. Farrer has appeared under protestation, and has alleged that his client is not lawfully cited, and is not bound to answer in this cause.

Read an affidavit to prove the proceedings in Chancery.

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COURT.

—
Caveat Day,
July 3.

Dr. Hay, for Gascoyne. — Deceased died the 6th February 1749 ; left an imperfect schedule, therein gave 6,000*l.* to his daughter, it was of deceased's handwriting. We admit the widow and daughter renounced administration with the will annexed, as next of kin and as legatee. Citation to shew cause why deceased should not be pronounced to have died intestate, or to prove the will by witnesses ; her renunciation does not bar her from contesting the will ; the Court of Chancery cannot affirm or set aside the will.

JUDGMENT—SIR GEORGE LEE.

I was of opinion she was no more barred by her renunciation of the administration from contesting the will than a legatee is who has received a legacy ; nay, that case is stronger, for a legatee by acceptance of the legacy does affirm the will, but a renunciation does not ; and yet a legatee under those circumstances is constantly admitted to controvert a will. With respect to the proceedings in Chancery, her bill there, wherein she prayed payment of the legacy under the will, is inconsistent with her suit here to set the will aside ; and therefore the proceedings in that Court will be stayed till the validity of the will is determined here. The Lord Chancellor has often directed the validity of papers to be tried here, and has stayed the proceedings in Chancery, as he did lately in the case of *Baynall* and *Sir Jacob Downing*. I therefore ordered Mr. Farmer to appear absolutely, which he did.



PREROGATIVE
COURT.COUSSMAKER *against* CHAMBERLAYNE.Caveat Day,
July 3.

Dr. Pinfold, for Coussmaker. — John Latton deceased died in November 1727; on the 30th October 1727, he made his will, appointed Samuel Wincop, Esq., Sir James Edwards, Bart. and John Coussmaker, Esq. executors and residuary legatees in trust, gave 60*l.* a-year for life to his brother William Latton, to his grand-daughter Frances Johnson 1000*l.*, to Mr. Wincop, jun. 200*l.*, and to William Latton, 500*l.* to be paid as hereafter mentioned; gives all the residue to the executors in trust, and to the survivor of them, and the executors and administrators of the survivor during the life of his brother, and of his (the deceased's) widow, to whom he gave for life all the produce of his estate beyond the 60*l.* a-year to his brother, and after their deaths, the said legacies to be paid, and then gave the remainder after payment of the said legacies to his grand-daughter, Ann Chamberlayne. Mr. Wincop alone proved the will, the other executors did not renounce, but did not act; John Coussmaker survived the other two executors, made his will, and appointed his son, George Coussmaker, the party in this cause his executor, who proved his will; deceased's brother died in 1732, and his widow on the 29th January 1754; the question is, whether administration *de bonis non, cum testamento* shall be granted to Ann Chamberlayne, who has no interest at present, till the particular legacies are paid, but who will have the particular interest in the residue, or to Coussmaker, the executor of the surviving trustee.

Where a trust is coupled in a will with an executorship, and the executor does not prove the will, the representative of that executor cannot take probate of it.

A mere trustee has no right by law to claim an administration.

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COURT.

Caveat Day,
July 8.

Dr. Bettsworth, contra. — Ann Chamberlayne is substituted legatee; John Coussmaker did not prove, and therefore his son and executor has no privity with the first testator.

JUDGMENT — SIR GEORGE LEE.

I was of opinion that the trust was coupled with the executorship, and therefore as John Coussmaker had not proved the will, and taken on him the trust, it was not transmitted to his representative, and the real interest being in Chamberlayne, (who as administratrix would be equally subject to the demands of the particular legatees as Coussmaker would,) I decreed the administration *de bonis non cum testamento annexo* to her.

N. B. A mere trustee has no right by law to claim administration.

Caveat Day.
July 29.

ALLEN against ALLEN.

After letters of administration have issued, the value of an estate can only be known from the inventory.

The Court will be regulated by the inventory in ascertaining whether further security may be necessary.

Dr. Harris, for John Allen.—Joseph Allen deceased made his will, and appointed his wife executrix, and gave the profits of his light-houses to his brothers William and John Allen, and to the sons of David Allen, another brother deceased; the executrix and deceased's brothers William and John survived the testator, but are since dead; the 17th November 1753, on the death of the executrix, administration *de bonis non, cum testamento* was granted to William Allen, one of the sons of David, who gave only 500*l.* security for his admi-

nistration. On the 4th sess. Trinity, 1755, John Allen, a brother of the administrator, cited him to bring in the administration, to exhibit an inventory, and to give better security. On the 3d July 1755. Mr. Cæsar, proctor for John Allen, exhibited an affidavit to shew the security was not sufficient ; we move that the administration may be brought in and revoked, unless better security is given ; the affidavit proves the profits of the light-houses to be 700*l.* a-year, and that there are 5000*l.* arrears upon that account due to testator's estate.

PREROGATIVE COURT.
Caveat Day,
July 29.

Act of the 25th June 1755 read.

Prays that the administration may be brought in, further security given, and an inventory exhibited. On the contrary, Altham, proctor for William Allen alleged that he is willing to give in an inventory, but that he ought not by law to give further security, unless it shall appear from the inventory that the security already given is not sufficient, and that the administration ought not to be brought in.

Dr. Hay, for William Allen. — William Allen was entitled to have administration ; the present question is, whether the administration shall be brought into Court, on suggestion that the security is not sufficient ; the affidavit is not proper evidence in this state of the cause, and therefore I oppose the reading of it ; it must appear upon the face of the inventory, or upon exceptions to it pleaded and proved, that the security is insufficient.

JUDGMENT—SIR GEORGE LEE.

I was of opinion the affidavit ought not to be read ; affidavits are proper evidence to ascertain

**PREROGATIVE
COURT.**

**Caveat Day,
July 29.**

the value of the estate, in order to fix the quantum of the estate before administration passes under seal; but after letters of administration have passed, the value of the estate ought to appear from an inventory, and if either it shall appear upon the face of the inventory, or upon proof of omissions therein, that the security is not sufficient, the Court will order further security to be given, and if that order is not complied with, will call in and revoke the letters of administration, but not before. I therefore, at present, only decree the administrator to exhibit an inventory.

**3d Session,
Michaelmas
Term,
November 24.**

**NEAGLE against CANTILLON and the EARL of
CASTLEHAVEN.**

**Probate of a will
refused, because
there was *dis-*
pendens respecting
the validity
of a codicil.**

Dr. Pinfold, for the Earl of Castlehaven.—Francis Garvan, Esq. deceased; upon his death several caveats were entered, but are all dropped. Neagle, who entered a caveat, proceeds no further. Cantillon and Lord Castlehaven, and the king intervening for his interest, are now the only parties; commissioners of appraisement in searching deceased's papers found a schedule, dated the 30th June 1743, all written by deceased, wherein he makes Lord Castlehaven executor, and gives all the residue of his estate, after payment of his debts to be distributed among the poor; the commissioners likewise found a book of accounts, in the last leaf of which is written by deceased what Cantillon has propounded as a codicil; it is dated the 25th August 1749, by which he gives Cantillon 2,700*l.* due from him to deceased on the balance

of an account ; this codicil is opposed by Lord Castlehaven and the Crown ; the deceased's estate is considerably indebted to Lord Castlehaven ; all sides agree in the necessity of having somebody appointed to take care of deceased's estate immediately ; the will is not disputed, and therefore we pray the Court to grant probate to Lord Castlehaven, the executor, who will undergo a monition to take probate hereafter of the codicil if it shall be established ; or if the Court will not grant probate of the will, we pray that administration *pendente lite* may be granted to Lord Castlehaven's nominee, and not to Mr. Francis, the crown's nominee. Cantillon does not interpose on this point further than to pray that the administrator may give good security.

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COURT.
—
Michaelmas
Term,
November 24.

Dr. Hay for the King. — By the disposal of the residue to the poor in general, without specifying what poor, the destination of the charity is in the crown. Cantillon agrees that an administration *pendente lite* is necessary ; Lord Castlehaven is a nude executor, who can only receive and pay debts but can make no distribution of the residue. The interest in the residue is vested in the crown in this case, 1 Vern. 224. and therefore, administration ought to be granted to the crown's nominee. Probate cannot be granted to the executor of the will till the question respecting the validity of the codicil is determined.

JUDGMENT — SIR GEORGE LEE.

I was of opinion, first, that probate of the will could not be granted to the executor, while a contest subsisted about the validity of the codicil, for that being undetermined, it did not appear what

PREROGATIVE COURT. was the will, and the executors could not take the common oath ; and I knew no instance of a probate being granted under the like circumstances. Secondly, I was of opinion the king had no interest in the grant of the administration *pendente lite*. The crown has interest only in the destination of the residue, which must be ordered hereafter in Chancery, when the executor had collected in the whole estate, and paid the debts, &c., and therefore I decreed the administration *pendente lite* to the nominee of Lord Castlehaven, the executor, good security being given.

November 24. **BITTLESTON, by her Guardian, against CLARK (a).**

A party cannot propound instructions as the last will of a testator in the same cause in which sentence has been given as to a will propounded, for there cannot be two definitive sentences in the same cause.

Dr. Hay for Bittleston. — John Clark, died 27th February 1750, left a widow, Ann Clark, and Thomas and Elizabeth Bittleston, his nephew and niece, and next of kin ; he was seized with a palsy on 25th February 1750, and lost his speech and senses. Will of 26th February 1750 was propounded by the widow, the executrix therein named. The court was of opinion upon the evidence that deceased was not in his senses on 26th February, when said propounded will was executed ; and therefore pronounced against it, and that the deceased, so far as appeared, was dead intestate, and assigned the widow to declare whether she would accept administration, in that cause. The instructions for said will were pleaded and exhibited, and Mr. Green, the writer, was examined to them. Sentence against this

(a) *Vide supra*, p. 229.

will was given on 3d July 1755, and Cheslyn, ^{PREROGATIVE COURT.} Clark's proctor, was assigned to declare whether she would accept administration. He can now do nothing else; but instead of declaring, he desires leave to propound those instructions in this same cause, which is unprecedented, and it would be very dangerous to allow it after an examination already had and published upon those instructions.

Michaelmas Term,
November 24.

Dr. Pinfold, same side. — They had an opportunity to have propounded this paper, but they made their option to set up the executed will, and must abide by that. A poor man may be harassed out of his right, by pleading different wills successively. *Deleg. Butler* and *Parmenter* (a), after sentence was given against a will, Parmenter would have set up another of a former date; but the Court would not suffer him.

Dr. Simpson and *Dr. Bettesworth* for Clark. — The instructions were pleaded in the former cause only as a circumstance to give strength to the will. In giving sentence the Court said he could not take notice of the instructions so as to pronounce for them as a will, because they were not propounded as such, and it would be very hard that the widow, by mistake in propounding a wrong paper, should be barred from a possibility of setting up the real will. We could not propound this paper of instructions and the executed will too. We admit the general rule that the same fact cannot be pleaded over again, but this paper is now offered *diverso intuitu*; it was then pleaded as an exhibit, it is now offered as the de-

(a) *Butler v. Parmenter*, Vol. I. p. 145. *notis.*

PREROGATIVE ceased's last will, and any legatee might propound it.

Michaehmas
Term,
November 24.

JUDGMENT — SIR GEORGE LEE.

I was of opinion Cheslyn was not at liberty now in this cause to propound the instructions, for he stood assigned to declare whether his client would accept the administration. Sentence was given in this cause as to the will propounded; and another will could not be set up in the same cause, for a man might leave twenty different testamentary papers, and it would be strange if the executor should be at liberty to propound them successively one after another, for then suits would be endless, and there would be twenty distinct definitive sentences in the same cause, which would be absurd and impossible. A legatee cannot set up a will after it has been litigated between the executor and next of kin, and pronounced against, unless he can shew the parties agreed to set aside the will by fraud or collusion, and so the Delegates held in the case of *Lewis and Bulkeley*(a); but a legatee, if he is afraid the executor will not do justice, may intervene for his interest pending a suit. These instructions cannot be propounded in this cause; but the widow may take out another citation against the next of kin in a new cause, to see these instructions propounded as deceased's last will, and proved by witnesses, and then the question will come properly whether she can propound them after having set up a former will which was pronounced against. I said I did not mean to give a determination now upon that point, but I inclined that she could not, for she had made her option, and had propounded the executed will, when she might

(a) *Lewis v. Bulkeley*, Vol. I. p. 513. and 190, notes.

have propounded these instructions; and therefore did not, at that time, look upon them as the deceased's will. If they had come to her knowledge since that suit, the case would have been different; but as the instructions were pleaded and examined to in that former cause, it would be very dangerous to suffer them to be examined to again, and would be very vexatious to the next of kin to be harassed with successive suits, and therefore I rejected Cheslyn's petition, and again assigned him to declare whether his client would accept administration.

PREROGATIVE COURT.
Michaelmas Term, November 24.

Clark appealed, but never prosecuted the appeal; wherefore the Delegates remitted the cause. The remission was exhibited in the Prerogative, 4th Session, Trinity Term, 30th June 1757, and I assigned Cheslyn to accept or refuse the administration by the next Court.

HACKMAN *against* BLACK.

November 24.

Jacob Hackman died intestate; caveat entered by a creditor, who made oath of his debt, and prayed an inventory and notice of the security before administration should pass under seal to the widow.

A creditor has a right to call for an inventory, but has no right to interfere in an administration bond.

JUDGMENT — SIR GEORGE LEE.

I decreed the administration to pass under seal to the widow, she undergoing a monition to exhibit an inventory, but refused to order her to give notice of the security, because I was of opinion a creditor had nothing to do with the administration

**PRAELOGATIVE
COURT.**

Michaelmas
Term,
November 24.

bond, though Mr. Stevens, the registrar, said a creditor had lately a suit at law (a) upon an administration bond, and had recovered against the sureties, because the administrator had not exhibited an inventory. But note, an administrator is bound by statute 21 H. 8. c. 5. to exhibit an inventory, and that clause in the bond is only in affirmation of the law as it stood before the statute of distributions.

November 24.

PIERREPOINT against HOLBECKE and DARLING.

**The identity of
a will sufficient-
ly proved.**

Dr. Pinfold for Pierrepont. — John Pierrepont is executor of John Holbecke, who died 22d December 1754. The will is dated 16th December 1754, attested by three witnesses, but was not executed till the 19th, and there are two codicils made 21st December 1754, not dated or executed.

(a) The Registrar may probably have alluded to the case of *Greenside and others v. Benson*, decided by Lord Hardwicke, and reported in 3d Atkins, 248. Lord Mansfield subsequently in the case of the *Archbishop of Canterbury v. House*, (Cowper, 140), held not only that the Ordinary could empower a creditor to put an administration bond in suit, but that it was *ex debito justitiae* to do so, "for (he adds), though a creditor has no concern in the latter part of the condition, namely, the distribution of the surplus amongst the next of kin; yet he is most materially and principally interested in the administrator's delivering a true inventory, and in the due administration of the effects." Some of these expressions apparently conflict with the dicta of Lord Holt in the *Archbishop of Canterbury v. Willis*, 3d Salk. 316, a case probably very familiar to Sir George Lee; but the result to be arrived at from the examination and comparison of these several cases seems to be, that if it is not competent to a creditor to assign the nonpayment of a debt to him as a breach of an administration bond, it is at least competent to him to assign as such a breach, the not delivering of an inventory.

Vide also an incidental reference to some of the above cases in Lord Tenterden's judgment in the *Archbishop of Canterbury v. Tappin*, 8th Barnewall & Creswell, 159.

The will and codicils are opposed by the widow; draft of the will was brought to deceased by Mr. Kirkby, the writer. On 15th December, the deceased made many alterations in it; deceased then said he would execute it; Kirkby told him it ought to be wrote over fair; deceased said he was very ill, and might die before the next day, and therefore he would execute the draft, which he did in the presence of the same three witnesses who afterwards attested the fair will. Full proof of deceased's approbation of the codicils. The witnesses say the will was executed on or about the 16th December 1754; intention of the testator, approbation of the will and codicils, and capacity, are fully proved.

PREROGATIVE
COURT.

Michaelmas
Term,
November 24.

Dr. Hay for Holbecke. — The fair will propounded was executed on 19th December 1754, but is dated 16th December. My objection to the will propounded is, that the witnesses all depose to a will executed upon the 15th December, which is the draft that is not propounded, and so they prove a will which is not propounded, and therefore cannot be pronounced for, and do not prove the will which is propounded.

JUDGMENT—SIR GEORGE LEE.

The testamentary witnesses seemed to be confused between the execution of the draft, and of the fair will; but the writer expressly deposing to the will *propounded*, and the other witnesses to the will *now shewn them* at their examination, which could be *no other but the will propounded*, I was of opinion the identity of that will was sufficiently proved, and therefore pronounced for the will and codicils.

PATRICKATIVE
COURT.

Cause appealed : afterwards appeal deserted and the cause remitted by the Delegates on 27th January 1757, for non-prosecution, with 20*l.* costs.

Michaelmas
Term,
December 3.

REPINGTON against HOLLAND and REPINGTON (a).

Administration with a will annexed, granted to a widow in preference to a mother.

A residuary legatee is generally entitled to an administration with the will annexed, because he is bound, for his own sake, to be careful in collecting the effects and improving the estate.

Dr. Pinfold for Elizabeth Repington, deceased's widow. — James Repington died in October 1753, in the East Indies, in the station of captain of a troop of dragoons in the East India Company's service ; he left a widow, a mother, three brothers, and a sister, but no children ; made a will, dated 15th December 1749, in which he made his wife universal legatee, and appointed her and John Holland executors. In 1754, Holland took probate ; on 20th February 1753, he wrote a letter from the Indies, in which he said he had great success in increasing his fortune, and was now in a condition to do what he had always desired, to provide for her, that she might live comfortably the rest of her life, and he insisted on her taking his brothers and sister to live with her, and then adds the following clause, viz. " As we are in continual war here, I have made my will, so that if any misfortune should happen to me, besides the one half of my fortune, *which you know who has a right to*, I leave you the other, except a few legacies for my brothers and sister, who I insist on your taking to live with you." The mother called Holland and the widow to bring in the probate of the will of 1749, and to shew cause why administration, with this letter annexed, should not be

(a) *Vide supra*, p. 106.

granted to her till the will referred to should be brought from India. The Court has pronounced this letter to be testamentary, and a revocation of the will of 1749, and has accordingly revoked the probate granted to Holland. The question now is whether administration, with this letter, shall be granted to the widow or the mother. There is no residuary legatee, and the widow has the greatest interest, for it is agreed the testator meant her by the words "*you know who has a right to.*"

PREROGATIVE
COURT.

Michaelmas
Term,
December 2.

Dr. Hay for Ann Repington, insisted that the mother was residuary legatee, and as such entitled to the administration, and that she had as great an interest as the widow, for the legacies to the brothers and sister are payable out of the whole clear estate.

JUDGMENT—SIR GEORGE LEE.

I was of opinion the mother was not a residuary legatee ; a *residuum* is something uncertain, which shall happen to be left after the debts and legacies are paid ; but here the mother had a certainty left her, viz. a moiety of the estate. Secondly, I was of opinion the mother had less interest than the widow, for the legacies to the brothers and sister were payable out of her half; the words "except a few legacies," &c. being directly annexed to her moiety. I further observed, that deceased by the will of 1749 had given his wife all, and made her executrix, and it did not appear that he had altered his intention with respect to her, but by the improvement of his fortune, having enough to provide for her and his relations too, he had made a new will only to provide for his relations ; that a widow under an intestacy, if

PREROGATIVE
COURT.

Michaelmas
Term,
December 3.

there were no legal objections to her, was to have administration preferable to a mother. I therefore decreed administration, with this letter annexed to the widow, till the original will, or an authenticated copy thereof shall be brought into Court. I observed that administration was granted to a residuary legatee, because he having only what should happen to be left after all charges paid, was bound for his own sake to be careful in collecting in and improving the estate.

1756.

Caveat Day,
January 8.

A commission
of appraisement
granted to value
the effects on an
intestate—ob-
jection taken to
the return,
overruled.

SMITH *against* ORAM.

John Ellis deceased made his wife executrix and residuary legatee ; she died before him ; he left two daughters, Mary, the wife of William Smith, and Elizabeth, the wife of —— Oram ; deceased died at Oram's house, where he had lodged some time ; Elizabeth Oram took administration *cum testamento* to him ; Smith cited her to bring in the administration, and shew cause why it should not be revoked for want of sufficient security, and to exhibit an inventory ; Oram brought in the administration, and submitted to give further security if the Court thought proper to order it ; it appeared that the estate was but about 700 l ., and the quantum of the security was 2,000 l ., but it was said the securities were not worth that sum. I ordered the sureties to be reported. Smith prayed a commission of appraisement ; Oram named commissioners, and joined in the execution of it, and she being in possession of deceased's effects was admonished to shew them to the commissioners ; the commissioners on both sides

certified that she refused to shew the household goods, and alleged that they were her own, for deceased gave them to her in his lifetime as a free gift; she made affidavit of the truth of that fact, and exhibited several affidavits in support of hers, and she also in her affidavit set forth what the goods were, and the value of them.

PREROGATIVE COURT.

Caveat Day,
January 8.

Smith's counsel insisted that Oram was in contempt, that she ought to have shewed the goods and had them valued, and then made her claim, and that she ought to have given in an inventory setting forth the particulars and value of those goods.

JUDGMENT — SIR GEORGE LEE.

But there being a very probable evidence that the deceased gave the goods in question to his daughter Oram when he left his lodgings and came to live with her, and there being no evidence in contradiction, I was of opinion she was not in contempt, and rejected Smith's petition.

FOWNES against ETTRICKE.

3d Session,
Hilary Term,
February 7.

I admitted an allegation pleading a pedigree, though the marriages of the ancestors were not set forth, the latest of which was about sixty years ago; but common reputation of relationship in such a certain degree, legitimacy, and public ownings were fully pleaded, and also declarations of persons now dead, who were conversant in the families of the parties, were admitted as proof of public reputation of relationship in the degrees alleged.

An allegation pleading a pedigree admitted to proof, although the marriages of the ancestor were not set forth.

Hilary Term.
February 7. MASKELINE and BROHIER *against* HARRISON.

The Courts of Common Law have ceased to object to the grant of administrations *pendente lite* where there is an executor named in a will propounded. Such administrations ought not to be granted without good reason.

John Harrison made his will the 1st October 1747; appointed his brother Maurice Harrison, executor; he afterwards went to the East Indies, where he died, but first made another will in 1754, and appointed Maskeline and Brohier executors; the brother as executor of a former will, opposed this latter will, and prayed an administration *pendente lite* might be granted to a person named by him; the other parties opposed the grant of any administration *pendente lite*, and Dr. Simpson, their counsel insisted, first, that an administration *pendente lite* could not by law be granted in any case where there was an executor, as in this case there must be one, for if the latter will wherein Maskeline and Brohier are executors should be set aside, then the first will wherein Harrison is executor would operate. Secondly, in this case there was no proof by confession, affidavit, or otherwise, that the estate or any part of it is perishable, which is essentially necessary, *Prerogative, Sutton against Smith*, 10th February 1753.

JUDGMENT — SIR GEORGE LEE.

As to the first objection made by Dr. Simpson, I said that though formerly the Court of Common Law had held that administration pending a suit upon a will where there was an executor, could not be granted, yet lately they had been of a different opinion, for in B. R. 4 Geo. 2. in the case of *Woolaston and Walker*, the whole Court upon consideration, held that such administration was good.

But as to the second point, I was clearly of opinion that administration *pendente lite* ought not to be granted without good reason, and I had declared so in the case cited of *Sutton against Smith*; (a) and as in the present case there was no evidence that an administration *pendente lite* was necessary or wanted for the benefit of the estate, I rejected Harrison's petition.

PARROCATIVE
COURT.

Halfary Term,
February 7.

HIGH COURT OF DELEGATES.

JUDGES PRESENT.

Right Honourable Sir GEORGE LEE, Mr. Justice CLIVE, Mr. Baron LEEGE, Sir THOMAS SALUSBURY, LL.D. Dr. COLLIER, Dr. DUCABRÉ, and Dr. SMALBROKE.

WILKINSON *against* Moss.

February 16.

Wilkinson took out a citation to shew cause why a faculty should not be granted to him for two seats in a certain pew in a church, in the diocese of Durham. Moss appeared, and alleged that those seats belonged to him, and were conveyed to him by one Rippon for valuable consideration in 1731, and he had ever since been in quiet possession thereof, and opposed granting the faculty. Wilkinson alleged they were conveyed to him by Ann Woodmash in May 1748, to whom they belonged. On the 16th March 1753, the Court at Durham pronounced against Wilkinson, and *decreed and de-*

A possessory title in a church seat sustained against an application for a faculty.

(a) *Sutton v. Smith*, Vol. I. p. 207.

HIGH COURT
OR DELEGATES.

February 16.

clared the two seats in question to Moss. Wilkinson appealed to York from decreeing the two seats to Moss, where the sentence was confirmed; he then appealed to the Delegates.

Dr. Hay, his counsel, insisted that the sentence must be reversed, because the Judge had decreed the two seats to Moss, whereas if Wilkinson had not made out a title, he could do nothing more than dismiss the cause, and cited the case of *Dearle against Southwell* (a) in the Arches, where I had reversed the decree of a faculty granted to one who appeared only as a defendant to oppose a faculty being granted to one who prayed it.

JUDGMENT.

But the whole Court of Delegates were of opinion that Wilkinson had shewn no title; that Moss had a good possessory right, and that the decree only confirmed Moss's possession as against Wilkinson, but did not give Moss an absolute right, as the faculty in the case of *Dearle against Southwell* did, and was for that reason rightly reversed.

The Delegates therefore in this cause confirmed the two former sentences, and condemned Wilkinson in 60*l.* costs.

N. B. Wilkinson examined Ann Woodimash, to prove that the two seats in question which she had conveyed to Wilkinson in 1748, were bought by Moss of Rippon in 1731, in trust for her. But

(a) *Vide supra*, pp. 93. 119.

the whole Court was clearly of opinion she was interested in the question, and therefore rejected her deposition.

HIGH COURT
OF DELEGATES.
February 16.

PREROGATIVE COURT OF CANTERBURY.

LE BRITON *against* LE QUESNE.

April 8.
Caveat Day,

Nicholas Le Quesne, of Jersey, bachelor, died in October 1746, made his will in September 1746, appointed his brother John Le Quesne executor, (who proved the will in the proper Court at Jersey,) and gave the residue of his estate to his sisters Elizabeth and —— Le Quesne; the deceased was a mariner, and had wages due to him at the Pay-Office, London, which the treasurer of the navy refused to pay upon the probate at Jersey, and the executor had not proved the will in the Prerogative Court. Elizabeth Le Quesne as a residuary legatee took out letters of request to the magistrates at Jersey to cite the executor to accept or refuse probate in the Prerogative Court, or to shew cause why administration *cum testamento* should not be granted to her, and she brought the will, or an authentic copy of it into Court; the magistrates at Jersey refused to execute the letters of request, and returned that no inhabitant of Jersey ought to be cited by any ordinary but the bishop of Winchester, and that the appeal from him lay only to the king in council. Elizabeth then prayed, and I granted, a decree against the executor, to be hung

The Treasurer of the Navy refuses to pay the arrears of a mariner's wages on the probate of a will granted in Jersey.
A decree issues against the executor to accept or refuse administration *cum testamento annexo* in the Prerogative Court. No appearance being given for him, an administration *cum testamento annexo* was granted to the residuary legatee.

PREROGATIVE on the Royal Exchange, which being duly served
Court. and continued, and no appearance given for the
executor, I granted administration with the will
annexed to Elizabeth Le Quesne, as being a resi-
duary legatee.

April 8.

GORDON against EYRE and DEAN.

An adminis-
tration *de bonis*
granted to a;
creditor after a
citation served
on the Royal
Exchange,
against a son
and another
creditor who
had taken out
an adminis-
tration.

George Nicholas Eyre, Esq. died in 1713, a widower intestate; left Charles Chester Eyre, his only child, a minor; in 1714, John Chamberlayne, his guardian, renounced the administration on behalf of the minor, and it was granted to Alexander Dean, a creditor; Daniel Hugh Gordon made oath that deceased died indebted to him 10*l.* 10*s.* by note of hand, and 100*l.* by decree in Chancery, and that he had sought for the said son, and Dean the administrator, for four years past, and had not been able to find them, but was informed they were both dead; whereupon Gordon took out a citation, which was served on the Royal Exchange against the son, and the said Dean, to bring in an inventory if living, or if dead, against their representatives, to shew cause why administration *de bonis* should not be granted to him; there being no appearance, I decreed administration *de bonis non* to Gordon.

April 8.

SIR EDWARD HAWKE contre Omnes.

Administration
to a creditor
after a service
on the Royal
Exchange.

John Bladen, lieutenant of a man-of-war, died a bachelor intestate. Sir Edward Hawke made

affidavit that he was a creditor to the deceased, that he had enquired and could not hear of any relations the deceased had, and believed he had none, and therefore prayed a decree to be hung on the Royal Exchange, *contra omnes*, to shew cause why administration should not be granted to him as a creditor; the decree was duly served, and nobody appearing, I decreed administration to Sir Edward Hawke, as being a creditor to deceased.

PREROGATIVE
COURT.

Caveat Day,
April 8.

ARCHES COURT OF CANTERBURY.

FITZGERALD *against* LADY MARY FITZGERALD.

1st Session,
Trinity Term,
June 14.

Lady Mary brought a suit in the Consistory of London against George Fitzgerald, Esq. for a divorce; in the course of the cause he was in the Consistory and the Arches (where it was removed upon his appeal upon a grievance, and retained by her consent), condemned in the Consistory in 100*l.* for alimony, and 65*l.* for costs, and in the Arches, in 120*l.* costs, for which sums, they not being paid, he was excommunicated three times, and was once signified; the question was, whether he being in contempt and excommunicated the admission of an allegation offered by him in his defence, and which was signed by his counsel, could be debated at his petition? In order to purge his contempt, he made an affidavit that he had not money to pay according to the several orders of the Courts,—that his *coatumacy* was not voluntary but arose from his poverty, —that he would com-

A contempt
which had ori-
nated from the
inability of a
husband to pay
alimony and
costs—sus-
pended.

ARCHES
COURT.Trinity Term,
June 16.

ply with all the orders of the Court as soon as he was able, set forth what money he had received and how it was expended, and swore that he had but 120*l.* which was the sum last taxed, and offered to pay that sum to Lady Mary, or her proctor, with the contumacy fees thereto. She made an affidavit that she had nothing but what her friends gave her, and insisted that he could not be heard till he had purged all his contempt and was absolved, but did not deny the facts in his affidavit, and she prayed the cause to be concluded.

JUDGMENT — SIR GEORGE LEE.

I was of opinion, that as his contempts did appear from his affidavit to arise from inability to pay the money, the effect of those decrees against him ought to be suspended till he was able to obey them; and as he was ready with an allegation, which his counsel had signed, it would be unjust to hear this cause *ex parte*, and deprive him of a possibility of making his defence, and therefore directed Mr. Gostling, his proctor, to pay or make a tender to Mr. Farrer, her proctor, of 120*l.* with the contumacy fees thereon, as he had offered in acts of Court, and assigned to hear on the admission of Mr. Fitzgerald's allegation the next court.

June 14.

GOODALL *against* GOODALL.

An affidavit not allowed to be read in contradiction to an allegation of Faculties.

Mr. Goodall brought a suit against his wife for adultery; the libel was admitted and witnesses examined. She gave in an allegation of faculties, in which she admitted she had a separate estate

of 45*l.* a year, but said her father's executrix would not pay her any of the income of it. The husband's counsel offered to read his affidavit as to the value of his income in contradiction to the allegation, but I was of opinion the affidavit could not be read, and admitted the allegation, and condemned him to pay her costs, but decreed nothing as to alimony till the proofs were before the court.

ARCHES
COURT.

Trinity Term,
June 14.

BUTLER against DOLBEN, calling herself BUTLER.

June 14.

Mr. Butler, son of John Butler, of Warminghurst Park, in Sussex, Esq. a minor, aged about eighteen, was married (as suggested) to Mrs. Dolben, in parts beyond the sea; the father being desirous to annul the marriage, and it being doubtful whether she was to be deemed a resident of the commissaryship of Bucks in the diocese of Lincoln, where she lived, or of the diocese of London, she being actually at this time a prisoner in the Fleet, by a commitment of the Lord Chancellor, for marrying a ward of that Court: Mr. Butler obtained joint letters of request from Dr. Simpson, Chancellor of London, and Dr. Bettesworth, Commissary of Bucks, praying the Court of Arches to take cognizance of the cause, and to cite her to answer in a cause of jactitation of marriage to John Butler, the father, and natural guardian of the minor. The cause being new in two points, first, as to the letters of request being granted jointly by two judges; and, secondly, as Mr. Butler sued in his own right, as father and guardian by nature, and not as guardian elected by the minor, and assigned

Joint letters of
request from the
Chancellor of
London and the
Commissary of
Buckingham-
shire, accepted
quatenus.

ARCHES
COURT.

Trinity Term,
June 14.

by the Court, I would not decree a citation but in open court, where I took notice of the novelties in this case, and accepted the letters of request, *quatenus* only, which I directed to be taken down in acts, and decreed a citation as prayed, but declared I should be ready to hear any objections the defendant, when she appeared, would make to the citation, and the jurisdiction of the Court as founded on these joint letters of request.

PREROGATIVE COURT OF CANTERBURY.

1st Session,
Trinity Term,
June 16.

The want of interest may be objected to at any time in a cause, especially before issue joined.

By the laws of Barbadoes, negroes belonging to a plantation are *globe adscripti*.

WRIGHT against RUTHERFORD and Others.

Dr. Hay, for Jane Wright. — John Price, deceased, left Jane Wright, widow, formerly the wife of Robert Wright, his sister of the whole blood, and Martha Rutherford, his sister, of the half blood, made his will 7th March 1734, attested by three witnesses, gave thereby his plantations in Barbadoes, with all his negroes thereon, without impeachment of waste, to his sister, Jane Wright, then the wife of Robert Wright, remainder to said Robert for life, remainder to their issue male, remainder to their issue female, remainder to his own right heirs for ever, and made Jane Wright executrix. On 13th February 1743, he made and duly executed another will, whereby he revokes all former wills, and leaves his plantations and all the rest of his estate, real and personal, to trustees, for the sole use of Jane Wright, during her coverture, exclusive of her husband, and after the death of her husband,

gives the remainder to her and her heirs for ever, and appointed the trustees, John Brinsden and John Dighton, executors. The testator died 23d February 1756. Robert Wright died before him, and left only one child by his said wife, viz. Charlotte Tyrrell, widow, a minor. Jane Wright entered a caveat. The executors appeared and renounced probate. Tyrrell appeared by her guardian to set up the first and oppose the last will. The question now is, whether Tyrrell has any interest under the first will to oppose the last will in this Court with respect to the personal estate. She has no interest by the first will in the personal estate, but has only a reversionary interest in the plantations at Barbadoes, and the negroes thereon, which by the laws of that island are all real estate. The Act of Assembly of Barbadoes in November 1668, declares negroes belonging to a plantation to be real estate, and that is confirmed by another act in 1672, which declares that negroes shall be personal estate for payment of debts, but not to any other purpose.

PREROGATIVE COURT.

Trinity Term,
June 16.

Dr. Bettesworth, for Tyrrell. — It is not alleged that those acts of Assembly have been confirmed by the king, and if not, they are of no force, but if they are valid, it is too late to make the objection now, for on the 18th of April last, Tyrrell's proctor was assigned to declare whether he opposed the latter will or not.

JUDGMENT—SIR GEORGE LEE.

I was of opinion the objection did not come too late, for *non* interest might be objected at any time, but more especially before issue joined, and that by the laws of Barbadoes, negroes belonging to a plantation are *glebae adscriptitii*, and are part

PREROGATIVE
COURT.

Trinity Term,
June 16.

of the real estate, and therefore pronounced against the interest of Mrs. Tyrrell to oppose the last will in this Court, she having no interest under the first will in the deceased's personal estate.

June 16.

PEARSON against GAMON.

A creditor having made his option to sue in Chancery by a bill of discovery, must be bound by such option to proceed in that Court.

John Hemming is the deceased ; Richard Gamon is his executor. In April, 1755, Pearson, a creditor by bond, cited Gamon to bring in an inventory and to take probate ; he brought in a declaration in which he said that the deceased carried effects with him abroad, of which he could not then give any account, but would when he received any. No objection was taken to the declaration, and Gamon was dismissed. In May 1755, Pearson filed a bill in Chancery against Gamon, for a discovery of deceased's assets, to which, in July 1755, Gamon answered, and that cause is now depending in the Court of Chancery. Pearson again cited Gamon to give an inventory in the Prerogative Court. Gamon appeared under protest, and alleged that Pearson had made his option by filing a bill for a discovery in Chancery, and that he ought not to be harassed in both courts for the same matter, and prayed to be dismissed with costs. Pearson replied, that Gamon had, since filing the said bill, had an account of deceased's effects from abroad, that he could not have a full discovery of said effects under his present bill, but must amend it, which would be in nature of a new bill, and therefore that the matter was a *res integra*, and he was at liberty now to proceed in this Court.

JUDGMENT—SIR GEORGE LEE.

But as there was now a bill for discovery of deceased's assets depending in Chancery, I was of opinion it was not a *res integra*; that he had deserted this Court where he had originally begun, and had made his option to proceed in Chancery, and could not revert to this Court while that suit was depending. I therefore rejected Pearson's petition, and condemned him in 1*l.* 6*s.* 8*d.* costs.

PREROGATIVE COURT.
Trinity Term,
June 16.

CLARK against CLARK and Others.

June 16.

George Clark, a freeman of London, subject to the custom, died intestate, left no children, but left a widow, Hester Clark, who is entitled by the custom to one moiety of his personal estate, and to half the other moiety also by the statute of distribution, and he also left a sister, Hester Taylor, widow, and several nephews and nieces, who are entitled to distribution. Taylor entered a caveat and prayed a commission of appraisement, in which the deceased's widow joined. Taylor now prays that the expences of the commission of appraisement may be paid out of the estate. Clark opposes it on suggestion that the estate is insolvent, in which case the court never orders expences to be paid out of the estate, because it would injure creditors.

The expenses of a commission of appraisement to be paid out of the estate of an intestate before distribution, but after the payment of the just debts.

JUDGMENT—SIR GEORGE LEE.

I decreed the expenses of the commission of appraisement to be paid out of the estate before distribution, in case it shall hereafter appear that

Parocatenus there is any estate remaining to be distributed after all the just debts are discharged.

Trinity Term,
June 16.

2d Session,
Trinity Term,
June 23.

An allegation
propounding an
unfinished paper
admitted to
proof.

REEVES against GLOVER and Others.

William Finch, died 5th December 1755, made his will dated 20th June 1743, Mrs. Reeve executor, she propounded that will and three codicils, A. B. C. ; Mrs. Puddephat, one of deceased's next of kin, and a legatee in a latter as well as said will, propounded a schedule wrote by deceased in July 1752, above three years before his death ; it contains real as well as personal estate, not executed, Mrs. Reeves is appointed executrix therein, but no residuary legatee is named ; upon debate of the allegation propounding this schedule, it was urged that it ought to be rejected, because a paper under the above circumstances could not operate to revoke a former executed will.

JUDGMENT — SIR GEORGE LEE.

But I was of opinion the facts ought to appear before the court to found any observations that could arise in point of law. Possibly this schedule might not revoke the executed will, but might well consist with it when they came to be considered together, and therefore I admitted the allegation.

June 23.

BRADSHAW against BRADSHAW.

The words
"rest and re-
sidue" include
the whole per-
sonal estate.

Robert Brashaw died a bachelor, made his will and appointed his mother, Elizabeth Bradshaw, sole executrix, gave her a legacy of 500*l.* also

lately, and devised to her a messuage with the appurtenances, &c. for life, and then gave to her the use and interest of his plate, furniture, money, stocks, and all the rest and residue of his personal estate for life; and the remainder after her death of all such effects and residue he gave to his cousin Thomas Bradshaw, his heirs &c. for ever. Thomas Bradshaw cited her to bring in an inventory and account; she gave in one setting forth the particulars, but not the appraised value of any, and said she had sold part of the plate and stocks, but did not set forth to whom, nor the value thereof. Thomas insisted that all the effects ought to be appraised, and the particular value of each thing to be specified in the inventory. Elizabeth's counsel urged that as the will was worded, all the specific things mentioned therein belonged absolutely to her, and that only the residue exclusive of them was given to Thomas, and therefore she ought not to set forth the value, for otherwise the words "and the rest and residue" would be useless.

PREROGATIVE COURT.
Tinny Term,
June 16.

JUDGMENT—SIR GEORGE LEE.

But I was of opinion that the words "rest and residue" were useful to take in his whole personal estate, in case anything should be omitted in the enumeration of particulars, and that the testator gave her only for life the use of specific things, and the interest of his money, stocks, &c., and she had no power to alienate any part thereof; on the contrary, that Chancery would compel her to give security that every thing, or the value thereof, reasonable wear and tear being allowed, should be forthcoming at her death. I therefore directed that the plate, goods, &c. should be appraised,

PARROGATIVE COURT. and that she should give in a further inventory specifying the value of each particular.

Trinity Term,
June 16.

June 16.

CUNNINGHAM against Ross.

An allegation propounding a testamentary schedule admitted.

Elizabeth Cunningham, who claimed to be the widow of David Cunningham, M. D., gave in an allegation propounding a testamentary schedule or will, in which the deceased gave to the said Elizabeth all his bills, bonds, &c. belonging to him, lying in the lodgings he possessed in the house belonging to Mr. Smith.

On debate of this allegation, Dr. Hay insisted that the allegation ought to be rejected, for Elizabeth had no testamentary interest, because the devise was void; deceased having no effects at his death in the house of Mr. Smith, and cited 2 Vern. case of the *Earl and Countess of Shaftesbury*, the testator devised to his wife all his goods that should be in his house; before his death he removed all the goods from said house; held the devise was void.

JUDGMENT — SIR GEORGE LEE.

But I was of opinion this case differed from that, for there the testator devised all his goods *that should be in his house*, which implied that should be there at his death, but in the present case, the words were only descriptive of what the testator meant to bequeath, and therefore it was immaterial whether they remained at Smith's house at the time of his death or not. I admitted the plea.

HAY *against* MULLO (a.)Trinity Term,
June 23.

George Hay, mariner, dying in 1749, a bachelor, left a mother and two sisters living in Scotland; on the 14th May 1737, he with his own hand filled up the blanks of a printed will, and executed it in presence of two witnesses; appointed David Mullo, with whom he then lodged executor and universal legatee; in December 1750, Mullo took probate; in Michaelmas Term 1752, the mother cited him to bring in the will and prove it by witnesses; he propounded it, and fully proved the *factum* of the will; the mother did not plead but cross-examined the witnesses. William Gillespie, the only surviving testamentary witness, said he had been witness to a will and power from deceased to Mullo, and on interrogatories, that he believed deceased's circumstances were not great in May 1737, that he was then mate of a ship, but afterwards became a master, that he (the witness) does not know, nor ever heard, but believes said will was made to secure a debt to Mullo, as deceased had lodged some time at Mullo's house, and respondent has heard Mullo say deceased was indebted to him; the counsel for the mother admitted the *factum* of the will, but insisted it was void as being made to secure a debt.

A mariner's
will established,
there being no
proof that it
was made to se-
cure a debt.

JUDGMENT—SIR GEORGE LEE.

But as there was no proof that the will was made to secure a debt, but rested only on the be-

(a) A report of this case is given in the notes to the case of *Zacharias v. Collis*, 3 Phill. 194.

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—
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June 23.

lief of the witness, and on the contrary, it was proved by two witnesses that the deceased a short time before his death had expressed a great esteem, regard, and friendship for Mullo, and said his will and power were there and that he had made a will in favour of Mullo, and in fact had suffered the will to subsist for above twelve years, though he was often in England, and might have revoked it if he had intended that his relations should have his effects; I pronounced for the validity of the will.

June 24.

TAYLOR *against* TAYLOR.

The right to an administration contested by two persons, each asserting himself to be the widow of the deceased, granted to the one whose marriage was expressly proved by two witnesses against whom there was no essential exception.

A legal marriage cannot be inferred from mere co-habitation where the actual fact of an earlier marriage is proved.

Dr. Hay, for Ann Taylor *alias* Addis.—Thomas Taylor died intestate. 1st sess. Michaelmas 1753, Hughes alleged Mary Grant *alias* Taylor to be deceased's widow, and prayed administration. Alexander, for Ann Addis *alias* Taylor, alleged and prayed the same; both interests denied and propounded. Ann pleaded that on or about the 30th June 1738, deceased and she went together to a house kept by Wheeler in Turn-again-lane, in the parish of St. Sepulchre, and were lawfully married by Walter Wyatt, clerk, in presence of Samuel Grout and others. Mary pleaded that deceased and she were married at the Fleet on the 6th September 1747. The question is, which is the lawful widow. 3d sess. Easter, 1754, Hughes pleaded a marriage between deceased and one Isabella Noble, at the Fleet, on the 10th April 1736, and that deceased lived with her as his wife after 1738, and that she died before the 6th September 1747; we pleaded contrary, that deceased was born in June 1721, and was therefore but 15 years old in 1736; and

that Isabella Noble was then the wife of Jacob Johnson, and was married to him the 5th February 1734-5. We do not deny deceased lived with Noble, but we insist they have not proved deceased's marriage with Noble ; they have pleaded deceased was born in 1714 ; the principal question is, whether Ann Addis has proved her marriage to deceased in 1738. Samuel and Mary Grout swear they were present at the marriage of deceased and Ann Addis in 1738, and that they also were married at the same time and place, and that Samuel Grout gave Ann Addis to deceased in marriage, and that after their marriages they all went together to the house of one Richardson, the Coach and Horses in Kent-street, where they all lay that night, and that deceased and Ann afterwards lived together as husband and wife with her mother for above a year, and then they parted. We admit that deceased did improperly cohabit with Noble and with Mary Grant, and had children by them, but during the time of said cohabitation, he often owned he was married to Ann, by whom he had a child still-born ; deceased was a lighterman, and kept a public-house, and was a person of an indifferent character ; he died the 22d October 1753 ; the questions will be, whether we have proved that deceased married Ann Addis in 1738, and whether they have proved that he married Isabella Noble in 1736, and that she was then a single woman.

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Dr. Simpson, for Mary Taylor. — Deceased left Mary his widow, and four or five children by her ; no account where Ann lived from 1739 to deceased's death. We have proved uninterrupted cohabitation with reputation from 1747 to deceased's

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death. On the 10th April 1736 he married Isabella Noble, and lived with her till her death on the 21st August 1747, with reputation ; Isabella died in Guy's Hospital, and deceased had her corpse brought to his own house and buried from thence as his wife, and his relations attended the funeral ; they say he could not be married on the 10th April 1736, because he was then but 15, but they have not proved it ; on the contrary, we have proved he was born in 1714, and was the son of Henry and Mary Taylor, and not of John and Mary, as they pleaded ; they pleaded that he was bound apprentice in 1732, but we have proved he was bound in 1730 ; to invalidate his marriage with Noble, they have pleaded that in February 1734-5 she was married to Jacob Johnson, and that he did not die till 1738, but his death in 1738 is not proved ; they have pleaded that deceased did marry Noble on the 5th July 1738, five days subsequent to their pretended marriage between deceased and Ann ; no other evidence of that marriage but this ; a sister of Ann's says she saw a certificate of said marriage at the Fleet ; no cohabitation with Ann pretended but for a year, or maintenance but by one witness proved, and great exceptions to that witness ; the Grouts who depose to the facts of that marriage differ widely in their evidence as to circumstances. In April 1736, deceased's uncle swears deceased and Noble owned each other as husband and wife. The question is, whether we have not made a better proof of our marriage than they have of theirs.

Witnesses for Ann Taylor, alias Addis.

1. Mary Grout, examined in 1754.—Deponent knew deceased when he was an apprentice, and to his death, and knows Ann Addis ; upwards of 15

years ago deceased used to drink with Ann Addis, deponent and Samuel Grout ; deponent's husband and deceased, and said Ann, about fifteen years ago went together to the Fleet, and were all there married by Walter Wyatt, clerk ; and deponent's husband gave Addis to deceased, and deceased gave deponent in marriage to Samuel Grout ; after their marriages they went to Richardson's, in Kent-street, and shewed the certificate of their marriage to Ann's mother, and they all lay that night at Richardson's, and deceased and Ann afterwards lived together at her mother's for above a year, and when deceased kept a public-house, Ann used to call there and drink, and paid for what she had ; has heard deceased call her wife, and she was esteemed his wife by her relations.

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10. Int. Noble was not always owned by deceased as his wife, for deponent has heard both deceased and Noble declare they were not married. 12. Int. The day they were married they went from Ann's mother's house by water through bridge from Horsleydown, and were married about ten at night.

2. Samuel Grout.—In June or July 1738, deponent and his wife and Ann Addis *and deceased met together at Ann's mother's house, and went from thence across the water, and went to the Fleet*, and deponent and his wife were first married, and then Ann Addis and deceased were married, and deponent gave her away, and they all went and lay at Richardson's ; deceased and Ann lived together at her mother's for above a year, and Ann was reputed deceased's wife.

3. Int. Deponent does not know where his own wife has lived for two years past. 5. Int. Has heard his wife was tried at the assizes in Surry

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since respondent left her. 10. Int. Has several times heard deceased say he was not married to Noble. 12. Int. Deceased did not make a long courtship to Ann ; *they went from Richardson's to the Falcon Stairs to go to be married.* 4. Int. *2d loco.* Deponent first knew Ann about a year before her marriage ; she lives by selling packthread.

3. Mary Kevitt, widow, examined in 1754.— Deponent is mother to Ann ; about 15 years ago deceased and Ann told deponent they were married, and shewed her a certificate of their marriage, and they lodged in the same house with deponent for above a year ; deponent has often gone to deceased with Ann, when he kept a public house, and he then owned her to be his wife.

4. John Richardson.—Deponent first knew deceased about 17 years ago, and knew Ann Addis ; about 15 years ago deceased and said Ann and Samuel and Mary Grout came to deponent's house together, and said they were married, and lay at deponent's house together that night.

4. Int. Never knew Ann go by any other names than Addis and Taylor.

5. Mary Lawler.—Deponent is sister to Ann ; about 15 years ago deceased and Ann lived together at deponent's mother's as man and wife, and were so esteemed, and deceased owned to deponent that she was his wife.

4. Int. Ann lived with her parents till her father died, and then went to service ; she now sells packthread about the streets ; does not know where Addis has lived of late.

6. Deborah Edmunds.—About 13 years ago deponent first came to know Ann, and first came to know deceased about 11 or 12 years ago ; Ann at deponent's house, insisted on deceased's main-

taining her, and he then owned she was his wife, and said it was owing to her jealous temper they had parted; says she saw deceased once give Ann two shillings, and another time eighteen pence.

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7. Thomas Wiltshire.—About 10 years ago, deponent was intimate with deceased, and Ann often came to deceased; deponent heard him own her to be his wife, and said he was married to her in his nonage; Noble then lived with deceased.

11. Int. Noble was always treated by deceased as his wife to his death.

8. Mary Bencraft.—Deponent knew deceased and Ann, and when deponent knew them they lived together in Great Bandy-leg Walk, and deceased owned her to be his wife. About five or six years ago, deponent and Ann being at Billingsgate, they met with deceased, and went together to drink, and deceased then swore she was his wife, and that he was first married to her.

Witnesses for Mary Grant, alias Taylor.

1. Mary Grant.—Deponent knew deceased to his death, and has known Mary Grant from a child; she is sister to deponent's husband; deceased, on the death of his wife, Noble, courted Mary Grant, and they, in September 1747, lived together as husband and wife, and owned each other as such; they lived for a year and a half on Green-bank, and constantly owned each other; on 26th July 1748, said Mary was brought to bed of a son, and said child was, in deponent's presence, baptized as their lawful child; in December 1750, they had a daughter, which was baptized Mary, as their lawful child; sets forth divers places where they lived together, and says they at all these places lived as man and wife, and were so esteemed; in April

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1752, she had another son by deceased baptized William; they cohabited together as lawful man and wife, and were so esteemed to deceased's death on 22d October 1753; she had another child born 2d October 1753, which deceased owned to be his lawful child, and said Mary was esteemed deceased's lawful wife.

2. Henry Crockford. — To his death, deceased and Mary lived together, and constantly owned themselves to be lawful husband and wife.

3. Rebecca Jermyn. — Six or seven years ago deponent became acquainted with deceased and Mary; they lived together, and constantly to his death owned each other as man and wife; proves birth and baptism of children, which they owned to be their lawful children.

4. Susanna Howard. — Proves courtship between deceased and Mary, and cohabitation with reputation to his death, and birth of children.

5. Eleanor Fletcher. 6. Mary Bennett.—Prove exactly the same.

The entry of the baptisms of the children were admitted to be proved.

7. Thomas Adlington. — Deceased and Mary always owned each other to be husband and wife, and called one another so.

8. Hannah Smith. — About seven years ago, a man, who called himself Thomas Taylor, came to deponent's house with the producent, and said he was going to be married to that woman; deponent recommended them to Stanley, who kept a marriage house in the Fleet, and they went together.

9. William Stanley. — In September 1747, deponent lived with his mother, who kept the "Two

Sawyers," in Fleet Lane ; a person, who went by the name of Thomas Taylor, and the producent came there to be married, and one parson Tar-
rant, on 6th September 1747, married them, and deponent acted as clerk, and an entry was made of said marriage.

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10. Thomas Penry, apothecary.—Deponent at-
tended Isabella Taylor, in 1747, in her illness; in 1748 deceased and producent lived together as husband and wife, and did so to his death, and they owned each other, and were so reputed.

11. William Lambell.—Proves baptism of their children as legitimate.

12. Thomas Cooper.—Deponent is uncle to the deceased ; proves cohabitation and birth of children with reputation.

13. James Cooper.—Deponent is son of Thomas Cooper ; swears deceased told him he was married to Mary Grant.

14. William Hammond.—Proves cohabitation.

Entries of baptisms, A, B and C, read.

Witnesses for Mary on second allegation.

1. Mary Grant.—Gives deceased a good character ; knew Isabella Noble ; never heard any ill of her ; heard deceased and she were married before he was out of his apprenticeship ; deceased had children by her ; Noble died in Guy's Hospital, 21st August 1747 ; she and deceased constantly owned each other as husband and wife, and she was buried as his wife, and his uncle and wife attended her funeral as mourners ; his relations owned said Isabella as deceased's lawful wife ; de-
poses to entries of baptisms of children deceased had by said Isabella.

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2. Thomas Cooper. — Gives deceased a good character; in April 1736, he and Isabella came to live together at his house on Greenbank as man and wife; deponent is uncle to deceased; believes he was married to Isabella in the Fleet on 10th April 1736, for deponent has seen an entry of such marriage in the Fleet, and they were commonly reputed to be married; they had two children which were reputed legitimate; she was buried from deceased's house as his lawful wife, and deponent attended her funeral.

3. Henry Crockford. — Proves cohabitation between deceased and Noble, as man and wife, to her death; believes the extract C, from Guy's Hospital, is the handwriting of Catlin the steward.

Read entries of baptisms of children of deceased and Isabella, as legitimate, and of the burial of Isabella in August 1747.

Witnesses on Ann's Second Allegation.

1. Thomas Wiltshire.—Has heard deceased own Ann to be his wife, and she claimed him as her husband.

2. Ann Potts, examined 1755.—Deceased bore a bad character, and received some stolen goods, upon which he absconded, but Isabella was taken up; she told deponent about nine years ago that she was the wife of one Johnson, and that deceased had seduced her from her husband; Ann claimed deceased as her husband, and she used to have beer at his house without paying for it.

3. Hannah Pidgeon, examined, 1755.—Twenty-two years ago, deponent came to know Isabella Noble; she about twenty years ago said she was married to one Johnson, who as deponent has

heard died about three or four years after; Isabella and Jacob Johnson owned each other for husband and wife; about eighteen years ago deponent came to know deceased; said Isabella then lived with him.

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4. Margaret Bynes, examined in 1755.—Twenty-five years ago deponent knew Isabella Noble; on the 5th February, twenty years ago, deponent was present when Jacob Johnson and said Isabella were married together at the Fleet, and they from that time owned each other; Ann claimed deceased as her husband from Isabella.

5. Deborah Edmunds.—Ann had a still-born child by deceased, which he owned as his lawful child; deceased allowed her two shillings a week for her maintenance.

6. Mary Lawler.—Proves entry of baptism of Thomas, son of John and Mary Taylor; proves cohabitation between deceased and Ann.

7. Sarah Jacobs, widow.—Deceased was bound apprentice to deponent's husband in 1730, and served for seven years; does not know he then lived with Noble.

Alleged by Ann that deceased was son of John and Mary Taylor, and that he was bound apprentice in 1732.—*N. B.* It appears from the books of the Waterman's Company, that he was bound the 2d October 1730. Pleaded, but not proved, that Jacob Johnson married Isabella in 1735, and died in 1738.

Witnesses for Mary on the Third Allegation.

1. Mary Lucas, examined in 1756.—About fourteen years ago, deponent came to know Ann Addis by deponent's son keeping company with

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her; deponent found her in bed with deponent's son and another man; and Sir John Ladd, on deponent's application, sent her to bridewell, by name of Ann Addis; and Richard Simpson, and one Hill also kept company with her; she then went by the name of Addis, and was esteemed a common woman, and now lives, as deponent has heard, with her husband's sister.

2. Thomas Cooper.—Gives Ann a bad character, as a lewd woman, and never heard she took the name of Taylor till since this suit; deceased was the son of Henry and Mary Taylor, and was born in January 1714.

3. Henry Crockford.—Deceased was son of Henry and Mary Taylor.

4. William Church.—Proves Exhibit B. which is an entry of the apprenticeship of Thomas Taylor, the 2d October 1730, and of deceased's baptism in 1714, as son of Henry and Mary Taylor.

Dr. Hay, for Ann.—If the marriage of Ann is legally proved, it is not material whether the subsequent marriage is better proved, because the last is void; when a marriage is to be proved *inter vivos*, a stronger evidence is necessary than when the parties are dead; no legal exception to Samuel or Mary Grout, and they swear positively to Ann's marriage with deceased; upon interrogatories, they agree as to the circumstances of the marriage, and therefore are to be believed; there is no proof of a fact of marriage between deceased and Noble; but to avoid the marriage of Ann in 1738, there must be a positive proof of that fact; they have not even shewed cohabitation with Noble before 1738. *Prerogative, 1735, Rolston* against

Mercator, no acquiescence in a wife will bar her PREROGATIVE COURT. claim. *Prerogative*, 1739, *Smith* and *Smith*. *Arches*, 1752, *Walton* and *Ryder*. (a)

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Dr. Smalbroke, same side.—No blemish on Ann's character before her marriage. *Prerogative*, *Willes* and *Fennell*, a slight variation among witnesses rather confirms their testimony.

Dr. Simpson, for Mary.—The Grouts differ upon interrogatories, in circumstances of which they were not previously apprized that they should be asked about; Mary Grout was tried at the assizes for Surry; deceased married Noble in 1736, and Cooper proves she cohabited with him in that year with reputation, consequently if he did marry Addis in 1738 that marriage was void.

Dr. Bettesworth, for Mary.—Mary Grout says they were married at ten at night; Samuel says at eleven at night; Richardson that (as he best remembers) they came to his house at five in the evening, and then said they were married; a regular cohabitation and owning between deceased and Noble is proved, and if a child of theirs had prayed an administration, the Court would have thought that a sufficient evidence of his parents' marriage, to have pronounced for his legitimacy, and to have decreed administration to him; Bynes swears to a particular day at twenty years' distance.

JUDGMENT — SIR GEORGE LEE.

I pronounced for the marriage between deceased and Ann Addis in 1738, and decreed administra-

(a) Vide Vol. I. p. 16.

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tion to her, because that marriage was proved by two express witnesses, against whom (though they varied in some particulars,) there was no essential exception, and they were confirmed by others, who proved that both parties owned their marriage *in recenti facto*, and several other witnesses spoke to occasional declarations to the same purpose at different times. As to the marriage with Noble, no fact was proved, nor cohabitation till after 1738, for though Cooper had deposed to a cohabitation between them in 1736, he had plainly sworn wrong, for he says they first cohabited together at deceased's house in Greenbank, whereas he did not live there till after 1738, and in 1736 was in his apprenticeship, and lived with his master; besides cohabitation alone, which only creates a presumption of marriage, is not sufficient to set aside an actual fact of marriage, and especially in this case, where the man had upon every supposition two wives at the same time, and therefore a legal marriage could not be inferred from his cohabitation, and there is great reason to believe that Isabella Noble was under the same circumstances, for there is a tolerable evidence that she married Jacob Johnson in February 1735, and there is no evidence that he died before 1736. I thought deceased's marriage to Mary Grant was sufficiently proved, but as he was before married to Ann Addis, the marriage with Mary was void.

This case was appealed, but remitted for want of exhibiting the appeal and prosecuting the cause. The remission was brought in the 3d December 1757, and I swore Ann administratrix.

ARCHES COURT OF CANTERBURY.

3d Session,
Trinity Term,
June 28.

HUGHES *against* HERBERT.

Dr. Simpson, for Herbert. — On the 20th June 1745, William Herbert brought a suit in the Consistory of St. David's against Margaret Williams, now Hughes, for restitution of conjugal rights; the suit depended there till the 27th May 1746, when sentence was given that they were husband and wife, and she was decreed to cohabit with him; she has since married one Hughes. On the 7th February 1756, she cited William Herbert into this Court to shew cause why all the proceedings in said cause should not be declared void, because during all that suit she was a minor, and was not cited to appear by a guardian, and did not appear by one. We insist that this Court has not jurisdiction, and have appeared under protest. We object that this is an original cause of complaint, and not an appeal, and therefore by statute 23 H. 8. c. 9., this Court is restrained from citing Herbert out of his diocese, unless in some of the five cases excepted in said statute; but this case does not fall under any of those exceptions; *querela*'s are never admitted here originally; if an appeal had been brought here and deserted, they could not afterwards have brought a *querela*. Arches, 4th session, Hilary, 1713, *Doughty against Newell*: Doughty, a clergyman was suspended, renounced his appeal, then brought a *querela* in the Arches:

The Court of
Arches has no
jurisdiction to
cite generally
except in the
cases specified
in the 23 H. 8.
c. 9.

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held, it could not be here, because the Arches cannot cite originally. *Dr. Wallis's case* was cited in that cause, where it was held that the time for appealing being lapsed, a *querela* could not be brought in the Arches.

Dr. Hay, for Hughes.—Hughes was about fourteen at the time of said suit; never appeared by a guardian, and even Herbert's proctor alleged her to be a minor. The question is, whether, she being then a minor, and not cited to appear lawfully, the proceedings are not void. She is now married to Mr. Hughes, and therefore brings this *querela*; a cause of nullity is a cause of appeal; nullity may be alleged within thirty years before the same judge, or before his superior. Clark's *Prax.* tit. 128.

JUDGMENT—SIR GEORGE LEE.

I was clearly of opinion that this was not an appeal, and if it was it was void, because not interposed within fifteen days after the sentence; that I had no authority to cite originally, except in the cases specified in statute 23 Hen. 8. c. 9. of which this is not one; that the case of *Doughty* and *Newell* was in point, and in all the cases I knew of where *querelas* had been brought in this Court, the jurisdiction was first founded by an appeal brought in due time; and I believed there was not one case to the contrary, for whatever the Canon law may say concerning bringing of *querelas* before the superior judge, this Court is now restrained by the statute of Hen. 8. I therefore pronounced that Herbert was improperly cited, and dismissed him, and said that Hughes might bring a *querela* in the Court of St. David's, and if it was rejected there,

she might appeal therefrom to this Court as a grievance, and so it was held in the Arches, June 1719, *Collins against Addison*.

I cited the following cases, in every one of which the jurisdiction of the Arches was first founded by appeals, and then *quærela's nullitatis* were brought.

June 26, 1724, *Palmer and Jackman against Hicks and Lydstone*; Arches, 1726, *Lomax against Lomax*; Mich. By-day, 1726, *Warren against Culme*; Delegates, December 9, 1734, *Rushworth against Mason and Others*; Easter Term, May 15, 1739, *Hawkins and Sumon against May*; Arches, 4th Sess. Hilary, 1713, *Doughty against Newell*, in which case this point was expressly determined.

ARCHES
COURT.

Trinity Term,
June 26.

BRADSHAW against BRADSHAW.

June 28.

Dr. Bettesworth, for Thomas Bradshaw.—Robert Bradshaw died in March 1745, made his will and appointed Elizabeth his wife executrix; she took probate; gave a legacy of 10*l.* to his nephew Thomas Bradshaw, in these words: “Item—I give to my well-beloved nephew Thomas Bradshaw, the sum of 10*l.*, to be paid by my executrix before her death.” Executrix declined paying it, and therefore we have brought this suit for the legacy, with interest from the testator’s death; she has tendered 7*l.* 10*s.* and alleges she has paid for said Thomas 2*l.* 10*s.* already. The words of the will imply an immediate payment of the legacy, because it was uncertain how soon she might die. The 2*l.* 10*s.* is a debt which this Court cannot determine upon, and interest is due from her delay of payment.

An application
for interest on a
legacy, rejected.

ARCHES
COURT.

Trinity Term,
June 28.

Dr. Hay, contra.—2*l.* 10*s.* was advanced for his freedom, and she has made affidavit that Thomas applied to her for that money to pay for his freedom. The will leaves it to the discretion of the executrix to pay the legacy when she thinks fit, but I admit under those words it would be payable upon demand from the legatee, but that must be a legal demand by a suit. The principal question is, whether this legacy shall carry interest? A legacy payable at a certain day, shall carry interest from the day of payment, 1 Vern. 166, *Jolliff and Crew*, Prec. in Chan. Interest cannot be due upon a 10*l.* legacy upon which no interest can have been made.

JUDGMENT—SIR GEORGE LEE.

I was of opinion the tender was sufficient; that the 2*l.* 10*s.*, as the executrix was a stranger in blood to the legatee, must be presumed to be money advanced in part of payment of the legacy; and as to interest upon such small legacies as this, upon which no interest could be supposed to have been made, the Court never allowed interest, especially to a stranger, *de minimis non curat lex.*

HIGH COURT OF DELEGATES.

JUDGES PRESENT:

Right Honourable Sir **GEORGE LEE**, Drs. **DUCARELL** and
BETTESWORTH.

SHEFFIELD *against* **BALL** and Others, Owners of June 28.
the ship *Scipio*.

Appeal from the Admiralty.

Sheffield, a mariner, sued for wages in the Admiralty, 24th February 1756. The Judge pronounced for the wages, but did not give costs. Sheffield appealed to the Delegates from not decreeing him costs. The question now was, whether the mariner should give fresh security to prosecute his appeal, &c. in the Delegates, and whether his proctor should exhibit a new proxy, or whether the security and proxy given in the Admiralty were sufficient.

Security given in the Court of Admiralty cannot be made available in the Court of Appeal. That Court requires fresh security and a new proxy.

JUDGMENT—**SIR GEORGE LEE**.

We were all clear that the proxy in the Admiralty was expired, and that if the cause should be retained in the Delegates, that the security given in the Admiralty cannot be made use of; and that by the practice, fresh security and a new proxy are always given upon an appeal, and so is Clark's *Prax.* *Adm.* tit. 57 & 59. *Dig. Lib.* 46. tit. 7. l. 20. (a)

(a) *Cum apud Sempronium judicem datus reus defendetur, stipulatione cautum est, ut quod Sempronius judex judicasset, præstaretur: à cuius sententiâ petitor appellavit: et cum apud competentem appellationi judicem res ageretur, defensore condemnato, quæsitum est, an stipulatio commissa esset? Respondit, secundum ea, quæ proponerentur, non esse jure commissam; Claudius, ideo in stipulatione adjicitur, "Quive in ejus locum substitueretur."*

3d Session,
Trinity Term,
June 30.

PREROGATIVE COURT OF CANTERBURY.

A next of kin
who has declar-
ed that she will
not oppose a
will, may re-
tract that decla-
ration if she has
not acted upon
it.

WRIGHT against RUTHERFORD and Others.

Dr. Hay, for Jane Wright.—John Price, Esq. died a bachelor 23d February, 1756; made a will 7th March, 1734, written by himself; devised all his plantations in Barbadoes and his negroes to his sister Jane Wright, with remainders, and made her sole executrix and residuary legatee; made another will 13th February, 1743, in which he revokes all former wills, gives all his plantations, and all his real and personal estate to trustees, for the sole use of his sister Jane, exclusive of her husband, since deceased, and appointed John Brinsden and John Dighton executors, who have renounced. Caveats entered by Mr. Smith for deceased's half-sister Martha Rutherford, and by Mr. Farrer for Charlotte Tyrrell, widow, Jane's daughter by Robert Wright, who died in testator's lifetime. Smith, for Rutherford, alleged her to be sister by the half-blood to deceased; Stevens for Wright confessed Smith's interest; Smith declared on the 8th April that his client Rutherford would not oppose the will of February 1743, or do any thing further in the cause; Stevens prayed administration to be granted to Wright with the said last will; Farrer, for Tyrrell, declared he opposed it; Stevens alleged she had no interest. First Session of this Trinity term, the Court determined that Tyrrell had no interest (a). Smith that day again

(a) See p. 266.

appeared for Rutherford, and declared she would oppose the last will. The question is, 1st. Whether she is not now precluded from opposing the will, by the declaration her proctor made on 8th April, that she would not oppose it: she cannot be allowed to vary as she pleases. Prerog. 15th December 1752, *Thomas against Davis*, Thomas had neglected to propound his interest; the Court would not afterwards allow him to propound it. (N. B. In that case Thomas was assigned to propound his interest, which he neglected to do, and administration *cum testamento* was thereupon granted to the next of kin, and afterwards he called the next of kin to bring in the administration, and would then have propounded his interest, but the Court thought he was too late, it not being a *res integra*.) 2dly, She has no interest to oppose the last will, for nothing is given to her by the first will, and that first will must bar her interest as next of kin. She must oppose both wills, for we have alleged in acts of court that we insist on the validity of the first will in case it is not revoked by the last will. We are ready to propound the first will in opposition to her interest, as a next of kin under an intestacy, and pray that we may have leave to do so.

PREROGATIVE
COURT.

Trinity Term,
June 80.

Dr. Bettesworth, for Mrs. Rutherford.—I admit that on 8th April last Mrs. Rutherford's proctor declared he would not oppose the last will, but no act having been done in consequence, and the matter remaining a *res integra*, she is at liberty to retract. Dr. Hay begs the question, for he supposes the first will is good, but we may oppose both. An executor may renounce, and retract again before administration is granted *cum testa-*

PREROGATIVE
COURT.
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June 30.

mento. In the act it is alleged, that since the 8th April Mrs. Rutherford has been informed that the deceased was incapable when the last will was made: if the first will is not a good will to all purposes, it will not bar the next of kin.

JUDGMENT—SIR GEORGE LEE.

As the matter was *res integra*, I was of opinion Rutherford was still at liberty to oppose the last will, and would not allow Wright to propound the first will in order only to destroy Rutherford's interest as next of kin, for that was a new attempt to get probate of a latter will, which perhaps could not be supported upon evidence. I therefore rejected Wright's petition.

June 30.

BODDICOTT and HAMILTON *against* DALZEEL.

The office of trustee differs from that of executor. Administration *cum testamento annexo*, granted to one of the next of kin who was before the Court, in preference to the trustees for the property.

Dr. Simpson, for Boddicott and Hamilton.—Gibson Dalzeel, Esq. deceased, made his will: he had many shares in the Sun Fire Office, and in the mines in Scotland, and a lease for years of a coalmeter's place, which he gives to Boddicott, Hamilton and others, in trust for his daughter, and after several contingencies, gives remainder thereof to his son Robert, and if he dies in his minority without issue, gives the remainder thereof to the trustees, for their own use; and gives all the residue of his estate to said trustees, to pay one moiety to his daughter, Miss Dalzeel, the party, and the other moiety to his said son. Deceased had also a good estate at Jamaica, which he gave likewise to trustees, to be divided in moieties between his said son and daughter; appoints no executor. The question is, whether administra-

tion with this will annexed shall be granted to Miss Dalzeel, the daughter, or to Boddicott and Hamilton, the trustees, who likewise pray that it may be granted to them. The son is a minor, and is not before the Court. The first point is, whether the trustees in this case are not to be deemed executors ? The second point is, whether (supposing they are not to be looked on as executors) the residue is not devised in such manner as will entitle them to the administration *cum testamento*, in preference to the daughter ? It is not necessary to appoint an executor in express words, it is enough to describe his office. The legal estate is in the trustees : the trustees are to pay one moiety of the residue to the daughter, and are to pay all the legacies, which is the business of executors. The daughter is to have only the profits of the mines, &c. for life, but if she has the administration, the whole estate will be vested in her. Deceased never meant she should have the administration. 1 Ventris 217, *Thomas and Taylor*, held that administration, notwithstanding the statute of 21 H. 8. c. 5. should be granted to a residuary legatee ; and an administration granted to a next of kin, as such, was revoked. The daughter is not in herself immediately a residuary legatee, for the residue is given to the trustees, to pay her a moiety only.

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Dr. Clarke, same side. — The Court in this case has a discretionary power of granting the administration, for it is a case out of the statutes. An executor, Swinburne says, may be appointed by implication. Deceased's whole fortune is vested in trustees, and if the daughter has the administration, the will cannot be performed. The daugh-

PREROGATIVE
COURT.

Trinity Term,
June 20.

ter has only the interest and profits of part of the effects for her life.

Dr. Hay, contra, for Miss Dalzeel.—There are five trustees, but only two appear to pray administration *cum testamento*. The daughter has the beneficial interest. The Court is ministerial in the grant of this administration, for she is both next of kin, and has the beneficial interest. Stat. 31 Edw. 3. and 21 H. 8. administrations must go to the next of kin, unless the residue is disposed of to another. Administration follows the real, not the legal imaginary interest. The trustees have no beneficial interest in the residue of the English estate. A trustee has very different powers from an executor. This Court has no jurisdiction over trustees, and therefore they cannot be called to account in this Court; but they can have relief against the daughter in Chancery.

JUDGMENT—SIR GEORGE LEE.

I was of opinion there were no words in the will that made the trustees, executors. They had only power to pay what was vested in them as trustees to the particular persons for whose use they held it, but had not a general power to receive and pay what was due to and from the estate, which is the office of an executor. That they were merely trustees, and could as such enforce the performance of the trusts in Chancery, and that all trustees might with as much propriety contend against the next of kin for administration *cum testamento* as these, and therefore, as the son was not before the Court, and the daughter was one of the next of kin, and had the beneficial interest, in a moiety of the residue, I decreed the administration *cum*

testamento to her, but directed that it should not pass under seal within fifteen days.

PREROGATIVE COURTS.

Trinity Term,
June 30.

LEVY *against* LOCKART GORDON.

Mr. Gordon took administration to Isabella Levy as her husband. Judith Levy, deceased's mother, cited him to bring in the administration, and denied him to be deceased's husband. He propounded his interest, and examined witnesses, and published their depositions. He then, in acts of court, alleged that he made two affidavits prior to his marriage, one in order to obtain a common marriage licence in the bishop of London's office, the other in the vicar general's office, in order to obtain a special licence, and exhibited copies of the said two affidavits, attested by the respective registers; and then his proctor prayed the answer of Mrs. Levy's proctor to the subscription and identity of said affidavits, which her proctor opposed.

In a suit for the grant of an administration, copies of two affidavits lodged in the Consistory and Archdeaconary Courts alleged in acts of Court, and attested by the respective registers, held that the opponent's proctor ought to answer to such subscriptions.

JUDGMENT—SIR GEORGE LEE.

As the offices are kept at Doctors Commons, and the registers' handwritings are well known, I was of opinion that Mrs. Levy's proctor ought to answer to the subscriptions of the registers, and whether the papers exhibited are true copies of the original affidavits remaining in the respective registries, but to nothing further, and decreed accordingly.

PREROGATIVE
COURT.

4th Session,
Trinity Term,
July 7.

Where a customary estate is devised by will, the Prerogative Court cannot compel portions to be allotted and distribution to be made.

JENKINS *against* MOORE.

Dr. Simpson for Mary Stringer alias Moore. — Andrew Stringer, freeman of London, died a widower 4th September 1754. He made his will, and devised to his daughter Ann Jenkins in these words: — “ *I give, devise and bequeath unto my daughter Ann Jenkins, the wife of Edward Jenkins, her customary part of my estate, as she is a freeman's child, according to the custom of the city of London;* ” and also gave to his daughter Ann Stringer, now Moore, her customary share as a freeman's child; and likewise gave to her all the residue of his estate, and made her sole executrix. In Michaelmas term 1754, Jenkins cited Moore to bring in an inventory and account, which she accordingly did. Hughes, Jenkins's proctor, alleged the inventory not to be full, and asserted he gave an allegation by way of exception thereto, but he gave none, and thereupon Moore was dismissed. Afterwards, on 1st session Easter term, 1755, Jenkins cited Moore into the Arches in a cause of legacy, which cause was dismissed also, because no libel was given in. In Easter term last, Jenkins cited Moore again into this Court, to exhibit an inventory and account, and to see portions allotted, and distribution made of the effects. Willis appeared for Moore under protestation. Here is a devise of the whole customary part. An executor cannot be called to distribution. This Court cannot make distribution under the custom. Prohibition will lie if this Court attempt to try the custom. The customary part must be sued for as a debt. If these daughters had been minors, the

Orphans' Court would have had the cognizance. If Jenkins claims under the will, she must bring a cause of legacy.

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COURT.
Trinity Term,
July 7.

Dr. Bettesworth, for Jenkins, admitted the facts were truly stated ; said his client claimed under the will, and that the suit in the Arches was not prosecuted, because till a full inventory was exhibited, the amount of the legacy was uncertain.

JUDGMENT—SIR GEORGE LEE.

I was of opinion that the part of the citation which called Moore to see portions allotted and distribution made in this Court, was, in this case, where a customary estate was devised by will, illegal ; and as to the other part, which called her to exhibit an inventory and account, it was a matter already determined, for she had exhibited an inventory and account, and Jenkins had opportunity to have objected to it. She not having done so, it is a *res judicata*, and that inventory must be taken to be full. I therefore dismissed Moore with costs.

FORFAR and PYTT *against* HEASTIE.

Dr. Hay, for Forfar. — Thomas Forfar is executor of Isabella M'Coul. She died a widow on 22d Jan. 1755, left George Heastie, her nephew by a brother, her only next of kin, for whom an appearance is given, but he has done nothing in the cause. She made her will 13th January 1755, appointed Forfar her executor, and her sister-in-law, Elizabeth M'Coul, sister of deceased's late husband, universal legatee. This will is opposed by Leonard Pytt, executor of a will dated 1st

The weight of
evidence pre-
ponderates in
favour of last
will propound-
ed.

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October 1754. Forfar has propounded it and examined witnesses; there is full proof of capacity. Pasmore, an attorney, took instructions, by which deceased gave all to Elizabeth M'Coul; no instructions for Forfar to be executor, but the will was read to deceased, and she approved it with Forfar's name inserted therein as executor. Deceased upwards of eighty; her hand guided to make her mark; deceased delivered the will to Elizabeth; a deed of gift to Elizabeth was signed at the same time; Elizabeth gave the writer two guineas for his trouble. Pytt has examined two witnesses, who prove nothing but execution. Pytt a stranger to deceased, has pleaded incapacity on 13th January 1755; no proof of it, on the contrary we have proved capacity.

Dr. Simpson, for Pytt. — On deceased's death, caveats were entered by Pytt and Heastie. Both wills were propounded by common condicitors. Very full proof of Pytt's will and of deceased's capacity then. Forfar very little known to deceased; none of the subscribing witnesses to Forfar's will knew her; the writer too, a stranger; no conversation with deceased at time of execution. Great objections to Daniel Ross's testimony. Pasmore owns he made Forfar executor without orders from deceased. Instructions by interrogation. Daniel Ross asked a person to attend to be a witness, before any pretence of instructions. The witnesses are greatly contrariant to each other. The nurse swears to capacity up to the deceased's death.

Witnesses for Forfar.

1. George Pasmore, gent. — On or about 13th January 1755, Forfar desired deponent to go to

deceased ; deponent went to a woman who deponent believes was deceased, but never saw her before ; she was then in bed, Elizabeth M'Coul asked deceased whether she was ready to make her will, and who should have her effects, deceased answered, "*take it all,*" and deponent, from such expression understood that she intended to leave all to Elizabeth ; and deponent from those instructions drew the will at his house, and Thomas Forfar was made executor by advice of deponent, he thinking it for the interest of Elizabeth for him so to be ; and deponent same day carried said will to said woman, who he believes to be the deceased, and read it all over to her audibly and distinctly, and she approved thereof ; and then she, in presence of deponent, of Andrew Ross, and Anthony Martin, set her mark to it ; and deponent guided her hand and she sealed it herself ; deponent asked her if she published it, and she delivered it as her last will, and then they three witnessed it ; deceased was very weak, but so far as appeared to deponent was in her senses.

2d Int. Producent owes deponent something.
4th Int. Deponent took the names of the parties down in writing, but no other instructions. 6th Int. Will was executed between six and seven in the evening ; deponent had no particular discourse with deceased. 9th Int. Believes deceased was in her senses ; deponent gave her a pen, which she took, and made a mark to the will, but it not being plain, deponent guided her hand to make it plainer. 12th Int. Deponent never saw deceased set her mark but to the will and to a deed of gift which deponent also drew, and she executed at the same time. 14th Int. Elizabeth M'Coul gave deponent two guineas.

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July 7.

2. Andrew Ross, tobacconist.—On Sunday, 12th January, 1755, deponent being at a public house kept by Daniel Ross, he told deponent that one Mrs. M'Coul was to make her will the next day, and desired deponent to be witness to it; deponent said he would, and next day the said Daniel carried deponent to a public house at Westminster, and Pasmore, and Forfar, and Martin came to them, and Pasmore produced the will and read it, and then they all went to deceased, who deponent never saw before; Pasmore then produced the will, and said to deceased, "I have brought your will;" she replied something, but deponent did not hear what; then Pasmore read the will audibly to deceased, and she said something, but deponent did not hear what, and then she signed and sealed the will; Pasmore asked her if she published it, she nodded, but said nothing, and then they attested it; believes deceased was of sound mind; Mr. Pytt being named at that time, deceased said Pytt had no business there.

6th Int. Deponent had no discourse with deceased. 9th Int. Deceased made the mark herself, without her hand being guided. 12th Int. She made the like mark to the deed of gift. 14th Int. Believes Pasmore was paid two guineas by Forfar. 15th Int. Deceased delivered the will to Elizabeth M'Coul.

3. Anthony Martin, Gent.—Producents and deponent are troopers in the horse-guards; before 13th January, 1755, Forfar desired deponent to be a witness to deceased's will; on said 13th January, at Forfar's desire, deponent went with him to deceased's, and there met Pasmore and Andrew and Daniel Ross; deceased a stranger to deponent; Elizabeth M'Coul told deceased that Pas-

more was come, then they all went to her bedside, and Pasmore read the will to her, and asked her if it was to her mind ; she answered, yes, and then Pasmore gave her a pen, and she signed and sealed it, and published and declared it to be her will, and then Pasmore, Andrew Ross, and deponent attested it ; and afterwards deceased delivered a paper, which deponent believes was the said will, to Elizabeth M'Coul, and said, "Here, Betty, take it, it is all for you ;" before she executed her will, the deceased said, that Pytt had no business there ; as far as appeared, the deceased was of sound mind ; deponent saw deceased in her coffin, and knew her to be the person who executed said will.

6th Int. The will was executed about seven in the evening ; deceased lay on her side when she executed it ; deponent had no talk with her. 9th Int. She made the mark without her hand being guided.

4. Daniel Ross, victualler.—Deponent well knew deceased, who lived in Angel-court, Westminster ; in the morning of the day the will was executed, deponent was with deceased, and she then said to Elizabeth M'Coul, "Betty, get an honest man, and I will make my will, and all shall be yours, and Mr. Pytt has no business here ;" before deponent went away Pasmore came, and then asked what he was sent for to do ; both deceased and Elizabeth said, to make deceased's will ; and deceased said, "Ay, do make it," and said to Elizabeth, "All shall be yours, Betty :" which were all the instructions deponent heard ; deponent was present in the evening when said will was read to deceased, and she executed it, and published and declared it to be her will in deponent's presence, and then it was attested ;

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believes deceased was of sound mind; deponent has often heard deceased say that Elizabeth should have all, and express great affection for her.

4. Int. Deceased gave the instructions, which were only that Elizabeth M'Coul should have all. 6. Int. The will was executed about six in the evening; deponent had no discourse then with deceased. 9 Int. Gives same account of making the mark as Pasmore does. 14. Int. Does not know Pasmore ever did business for deceased before.

Will read—calls Forfar her loving friend.

Witnesses on Pytt's Condidit.

1. Henry Taylor, Gent.—Deposes to will of 1st October, 1754; deponent was intimate with deceased; on 1st October, 1754, deponent being sent for by deceased, went to her to be a witness to her will; the will pleaded was produced by Pytt ready wrote, who read it to deceased, and she approved it and set her mark to it, and sealed, published and declared it to be her will, and then deponent and Nathaniel Grant attested it; deceased was of sound mind; deponent has often seen deceased set her mark, and she always used to set the same sort of mark as is set to the will of the 1st October.

2. Nathaniel Grant, Gent.—Deponent knew deceased; on or about the 1st October 1754, Elizabeth M'Coul came to deponent, and desired him to come to deceased to witness her will; deceased then acknowledged the mark at the bottom of said will to be her mark, and she then sealed, published and declared it to be her will, in presence of deponent and Henry Taylor, and they

attested it; deceased then discoursed very ration- PREROGATIVE
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ally, and was of sound mind.

Will propounded by Pytt read.

Trinity Term,
July 7.

*Witnesses on Pytt's Allegation to impeach For-
far's Will.*

1. Henry Taylor, Gent.—Deponent knew deceased twenty-three years before and to her death in January 1755; deceased was eighty-five or eighty-six years old; deponent was with deceased on Thursday, 16th January 1755, and another time about a fortnight before; on 16th January deceased was wholly insensible, and took no notice of deponent, and did not seem to know him; deponent staid about three quarters of an hour; the fortnight before deponent staid with deceased three hours, and for an hour she did not know him, but afterwards she did, but had not capacity to do any serious act; she was bed-ridden for above two months before her death; deceased always consulted deponent about her writing affairs, and has often said she would sign nothing unless it was in deponent's presence, and approved of by him.

2. Int. Elizabeth M'Coul came three times to deponent, and Pytt twice, to desire deponent to be a witness to deceased's will of 1st October, and said deceased desired them to come. 3. Int. Said will was ready wrote; knows nothing of instructions for it. 12. Int. Before deceased was buried, deponent advised Elizabeth to agree with Heastie.

2. Jane Sinclair.—Deponent well knew deceased; knows Henry Taylor, clerk, of the Savoy, who was commonly consulted by deceased, as deponent has heard.

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3. Isabella Taylor.—Deponent was intimate with deceased ; deponent went to see her between two and three in the afternoon of 13th January 1755, and staid with her half a quarter of an hour, and she then seemed to be perfectly insensible ; Elizabeth M'Coul told deceased deponent was there, but deceased lay with her eyes shut, and took no notice thereof ; deponent felt her pulse, and she had hardly any, and deponent could hardly perceive her to breathe ; deponent told Elizabeth she thought deceased was then dying ; deponent was with deceased about a week before, and she then made no answer to, or took any notice of deponent ; there was great intimacy between deceased and deponent's husband, Henry Taylor.

4. William Lumley, mason.—Deponent well knew deceased ; knows Henry Taylor ; great intimacy between deceased and him, and she consulted him very often.

5. Mary Lumley.—Deponent knew deceased five years before her death, she was 87 years old, was bedridden from about the Christmas before her death, which happened on the 22d January 1755 ; she was quite stupid, and did not know deponent, and believes she was wholly insensible ; there was great intimacy between the deceased and Henry Taylor.

Witnesses for Forfar.

1. Daniel Ross.—Deponent well knew deceased ; deponent was with her within two or three days of her death, and she was then sensible ; believes she was sensible till within a day or two of her death ; within three weeks of her death she complained her hips were sore by lying in

bed ; believes deceased had great affection for Elizabeth M'Coul, and deceased said she had been very good to her, and she should have all.

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2. John Morrison.—Deponent and his wife were with deceased about ten days before her death, and she was then very sensible, and deponent saw her twice before within two months ; has heard the will pleaded by Forfar was executed a day or two after deponent last saw her ; deceased expressed great regard for Elizabeth, and about two months before her death said Elizabeth should have all she had.

3. Elizabeth Morrison.—Deponent well knew deceased ; was with her on Christmas day 1754, and the next day, and she was at both times very sensible, but very weak ; deponent never saw her afterwards alive ; about three weeks before said Christmas deponent was with deceased, and she had then been abroad ; she then expressed great affection to said Elizabeth, and said that she should have all at her death.

4. Isabel Campbell.—Deponent attended deceased daily for near four years ; she was sensible to her death, and believes she was capable of making her will on the day she died ; ten days before her death, Pytt was with deceased, and when he was gone, deceased said " Why does that fiddling man come here, I have nothing to do with him ; " deceased complained three weeks before her death of the soreness of her hips ; on the day the will was executed deponent saw deceased before and after the execution, and she then spoke sensibly to deponent ; she often said that Elizabeth was more like a mother than a sister to her, and should have all she had.

8. Int. Believes Forfar was an old acquaintance

PREROGATIVE COURT. of deceased. 14. Int. Deponent knows Ross, whose christian name she believes is Andrew, by seeing him with deceased. 16. Int. Deceased's husband died about a year before her; deponent has several times heard deceased declare she would leave Elizabeth all she had.

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July 7.

5. Murdock M'Kenzie. — Deceased had great affection for Elizabeth, and particularly within four months before her death, deceased said she would leave all to her.

Dr. Hay, for Forfar. — William Heastie, deceased's nephew, does not appear before the Court to oppose either will; two witnesses fully prove execution of the will of the 1st October 1754, but nothing more; no evidence of relationship or affection to Pytt, but on the contrary disaffection to him, and great affection to Elizabeth M'Coul; the single question is, whether the will of the 13th January is valid; deceased had for three months intention principally to benefit Elizabeth; subsequent approbation makes the appointment of the executor good; Daniel Ross cannot write, and therefore was not a subscribing witness to the will; no expression is deposed to, that implies incapacity.

Dr. Simpson, for Pytt. — First will made with privity of Elizabeth M'Coul, who went to desire Taylor to be a witness to it; Forfar almost a stranger to deceased; all the witnesses and the writer likewise strangers to her; no proof that deceased desired any witnesses to be brought. Pasmore does not say Daniel Ross was present when instructions were given; circumstances of fraud, viz. Daniel asked Andrew Ross to be a witness before

it is pretended deceased gave instructions for a will ; Forfar did the like to Martin. Andrew Ross says Pasmore shewed them the will at a public-house and they all went together to deceased ; Martin says only he and Forfar went together. Deed of gift to Elizabeth shews incapacity, for thereby the deceased divested herself of her estate in her lifetime ; some of the witnesses say they attested the will in the presence of the deceased, others say in the next room. Campbell on the 4th interrogatory, says she knows Ross, whose name she believes is Andrew, by seeing him with deceased ; but Andrew swears he was not acquainted with deceased. Pasmore's inserting an executor of his own head is an evidence of deceased's incapacity. Forfar not having been named executor by deceased, cannot have a decree for the validity of the will.

PREROGATIVE COURT.

Trinity Term,
July 7.

Dr. Bettesworth, same side.—Variations between the witnesses ; proof of instructions is absolutely necessary in this case ; the will did not come from deceased's own motion ; why did not she make this will sooner if she intended it ; it does not appear deceased ever spoke to Forfar to get a person to make her will.

JUDGMENT—SIR GEORGE LEE.

I gave sentence for the will of the 13th January 1755, because I thought the weight of the evidence was in favour of the deceased's having a capacity adequate to making this will, whereby she gave all her effects to one person ; it was agreeable to her declarations for two or three months preceding, and which arose from Elizabeth's care of her in her declining state, though the subscrib-

PREROGATIVE
COURT.
—
Trinity Term,
July 7.

ing witnesses varied in some circumstances, yet they all agreed as to the execution of the will, and that deceased appeared to be sensible ; and there was no blemish upon the characters of any of the witnesses, and therefore I must give credit to them, though there were suspicious circumstances in the cause, particularly the deed of gift, and the appointment of Forfar executor, for which the deceased gave no instruction ; but as to the deed of gift it was not pleaded, but only mentioned upon interrogatories, and therefore as the contents did not appear to me, I could not lay much stress upon it ; as to the appointment of the executor, though it was a very improper behaviour in Pasmore, yet as the will was read over to the deceased and approved by her, with Forfar's name inserted as executor, I thought that approbation would have the effect of prior instructions, and so says Swinburne, and especially in this case, where Forfar is a mere nude executor and takes nothing by the will by virtue of his executorship, the whole estate being disposed of, and though Dr. Bettesworth determined otherwise in the case of the *Earl of Bellamont* and *Brigden*, (where he ordered the name of the Earl inserted as executor to be struck out, because the writer of the will said he inserted his name of his own head, though another witness swore the testatrix ordered the Earl to be made executor,) yet I never was satisfied with that opinion. As to Pytt's will, the execution was sufficiently proved, but he was a stranger in blood to deceased, and no evidence of affection to him, or of declarations in his favour, either prior or subsequent to that will appeared in the cause, and therefore it might be declared revoked upon a slighter

evidence than is necessary when a prior will is in favor of near relations.

PREROGATIVE COURT.

Trinity Term,
July 7.

ARCHES COURT OF CANTERBURY.

HERBERT *against* WRIGHT.

By-Day after
Trinity Term,
July 18.

Dr. Bettsworth, for Herbert.—Rebecca Wright deceased, made her will on 14th November 1741 ; Thomas Wright, executor ; he took probate the 17th February 1742 ; deceased left a legacy to her daughter Mary Herbert, in these words, “ *I give to my daughter Mary Herbert and her three children, to be divided equally, 100l., part of said 350l. South Sea annuities.* ”

Where a legacy is in gross, it is not necessary to plead the fund out of which it is to be paid.

N. B. She had before mentioned 350l. South Sea annuities ; Mary Herbert received her share of 25l. soon after the death of the testatrix, but the children’s shares were not payable till their apprenticeships expired. John Herbert, one of the children, brings a suit for 25l., his share, and the libel is opposed.

Dr. Simpson, for Wright.—The prayer of the libel is to have 25l. a fourth part of the said 100l. of South Sea annuities paid to him John Herbert. This is a specific legacy, it being a fourth part of 100l. South Sea annuities, part of 350l. South Sea annuities, they ought to plead that testatrix died possessed of 350l. South Sea annuities, and

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COURT.

By Day after
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July 13.

should have prayed that 25*l.* part thereof should be transferred to the legatee, and not plead in the manner they have done, as if it had been a legacy in gross.

JUDGMENT — SIR GEORGE LEE.

But I was of opinion that it was a legacy in gross, and that the 350*l.* South Sea annuities was mentioned only as the fund out of which it should be paid, and therefore admitted the libel.

July 13.

FITZGERALD *against* LADY MARY FITZGERALD.

30*l.* ordered to be paid by the husband into the registry, towards defraining the expenses of interrogatories of the wife, before a requisition was allowed to issue to Ireland, to examine witnesses on an allegation.

An allegation on behalf of Mr. Fitzgerald was admitted without opposition. Gostling his proctor prayed a Requisition to examine witnesses in Ireland. Farrer, Lady Mary's proctor, prayed that it should not issue till he had deposited in the Registry a competent sum of money to enable her to cross-examine his witnesses on interrogatories, and named 100*l.* as a competent sum. I ordered 30*l.* to be paid by Fitzgerald to Farrer before the Requisition should issue under seal.

July 13.

BUTLER *against* DOLBEN, calling herself BUTLER.

The 23d Hen. 8.
c. 9. devolves upon the Dean of the Arches the power of accepting letters of request in matrimonial

suits, without the consent of the party proceeded against. The Dean of the Arches is bound *ex debito justicie* to receive them. Letters of request offered by two ecclesiastical judges conjointly, not invalid on that account. In a suit for jactitation of marriage, brought by the father under the marriage act, in which the husband had appeared under protest, the Court refused him leave to extend his protest.

John Butler, Esq. as natural guardian to his son James Butler, a minor, aged about 18 years of age, brought a suit in the Arches by letters of request jointly from Dr. Simpson, Chancellor of

London, and Dr. Bettsworth, Commissary of Bucks, against Martha Dolben, calling herself Butler, for jactitation of marriage. She appeared to the citation under protestation ; *First*, for that the Arches had no jurisdiction, for the letters of request being from two judges were illegal and unprecedented, and the jurisdiction could not be founded without the consent of both plaintiff and defendant. *Secondly*, because Mr. Butler, the father, had no interest, and could not bring this suit ; the minor only, who was the party interested, could by a guardian lawfully assigned commence a suit of jactitation of marriage.

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COURT.

By-Day after
Trinity Term,
July 12.

Dr. Collier, for Martha Dolben, alias Butler,— This is a cause of jactitation of marriage, brought by Mr. Butler, the father, to annul the marriage of his son. Mr. Butler, jun. courted Martha Dolben, she consented, and they went abroad and were married at Antwerp the 7th March 1756 ; they consummated and lived publicly abroad as husband and wife till the 13th March 1756, when they returned home ; his father then applied to the Lord Chancellor, who committed her to the Fleet prison for marrying a ward of the Court of Chancery ; before her marriage she lived at Wexham in the county of Buckingham. 1st Sess. of this Term, Mr. Stevens, proctor for Butler, alleged that the husband was a minor of 18 years ; that his father was his natural guardian, and that she had falsely boasted and asserted that she was married to the son, and exhibited letters of request jointly from the Chancellor of London and Commissary of Buckingham ; the Court then accepted the letters of request, so far as by law they ought to be accepted ; a citation pursuant thereto, went out and was

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July 18.

served on her in the Fleet, which was returned the 2d session. The 3d session, Mr. Gostling said he should appear for her, but prayed time to obtain a special proxy; the Court granted it; and on the 4th session, Gostling appeared for her under protest, and objected that joint letters of request from two judges are unprecedented and contrary to the statute of citations, 23 Hen. 8. c. 9, and that the husband himself by a guardian properly assigned ought to be the plaintiff, and therefore prayed that the suit might be dismissed. Minors have always appeared by a guardian assigned.

Dr. Hay, for John Butler, Esq. father to James Butler.—The question now is merely preliminary. In June 1755, Mr. Butler placed his son, a minor, with the Rev. Mr. Wray, at Wexham, in Buckinghamshire, for education; on the 21st February 1756 he was seduced away by Martha Dolben and a relation of hers. Mr. Butler desires to have a determination whether the marriage pretended to have been celebrated at Antwerp is valid or not; doubtful what jurisdiction she belongs to, whether to the diocese of London, by being in the Fleet, or to the Commissaryship of Buckinghamshire by having resided there before she went abroad. The merits of the case will arise upon the statute 26 Geo. 2. for preventing clandestine marriages. She makes two objections to the citation; 1st. That the letters of request are improper; 2dly. That the father cannot bring this suit. I am willing to take the questions separate, and argue first upon the validity of the letters of request.

Read the act of Court and her proxy to Gost-

ling, by which he was authorized to protest upon both points.

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COURT.

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July 13.

Dr. Collier's argument.—The question is, whether this Court has any jurisdiction but upon appeals. The validity of a matrimonial cause is to be tried; a fact of marriage is admitted; upon that fact the Chancery proceeded; this is a personal action, and therefore the person of the minor must be before the Court to give answers, &c. Clark says that, in a jactitation cause, instead of a contestation of suit the defendant may plead; we have no cause of marriage with the father; we each object to the suit being in the father's name, but by a *quærela nullitatis*; and as this is not an appeal, a *quærela* cannot be brought, in *Herbert against Hughes* (a), in the Arches, this Term, it was determined that after an appeal from a gravamen is pronounced against, the Court cannot hold the cause but by consent of parties. Statute 23 Hen. 8. c. 9. refers in this case to the civil and canon law; by the civil law this question is decided only in general terms; *Prorogatio jurisdictionis* is voluntary or necessary by law. Maranta, part 4. Distinct. 12. *Prorogatio jurisdictionis à persona ad personam* must be with the consent of the parties. *Quando Juder habet limitatam jurisdictionem*, &c. We do not consent to this Court. *Actor sequitur forum rei*; but by this method, *Reus sequitur forum actoris*. Canon Law. 94 Can. 1603, the consent of the diocesan is required to letters of request. The judge alone cannot consent without a mandate from his bishop. Brossius de potest. vicar. the bishop in his court of audience has a concurrent jurisdiction with his vicar-general. The jurisdiction of this Court must be founded

(a) *Supra*, p. 288.

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by consent both of the parties and of the bishop *à quo*, a judge cannot devolve his jurisdiction. Brossius, lib. 2. quæst. 251. nu. 1., a judge cannot without special mandate from his bishop devolve his jurisdiction to the metropolitan. Superior judge also cannot take the cause without consent of the bishop *à quo*: it does not appear that there are letters of request, because they are not under office seal. Her domicil is not now at Wexham. She is of the jurisdiction where her husband resides; durance does not make a domicil. She is improperly cited by the father.

Dr. Hay, for Butler.—I agree that durance does not create a domicil; where the parties do not consent, the Court must determine. The statute authorizes the Court to judge of the reasons on which letters of request are granted. This is a new case arising upon the late statute of marriage; the doubtfulness of the jurisdiction is good ground for receiving the letters of request. Hob. 185. *Jones v. Jones*, reference from the inferior judge to the superior, held to be a good ground of jurisdiction under the statute of citations.

Dr. Bettesworth, same side.—The granting and receiving letters of request are discretionary; the statute does not oblige the inferior judge to take cognizance. In *Jones's case*, Hob. Rep., Dr. Talbot said, the inferior judge is not bound to give reasons for devolving his jurisdiction. Hob. f. 16. Neither party can be aggrieved by the Court's accepting letters of request.

JUDGMENT—SIR GEORGE LEE.

I was of opinion the jurisdiction of the Court of Arches was now entirely settled by statute 23 H. 8.

c. 9., that the Arches is by that statute empowered to take original cognizance, by virtue of letters of request, of such causes as the civil and canon law allowed the inferior judge to devolve to the superior, which are those that are called arduous causes, of which matrimonial were always esteemed the chief, that the statute vested the power of devolving in the judge, without mentioning consent either of the bishop or parties; that in fact the bishop's consent was never required, and that if the parties' consent had ever been deemed necessary, there hardly could be a cause commenced here by request, for the defendant almost constantly desires as many opportunities of appealing as possible for delay. As to the discretion of this Court, whether it shall accept or refuse letters of request when granted by a proper judge, the Delegates held in the case of *Dr. Pelling against Whiston*, (a) that the Dean of the Arches was bound to receive them *ex debito justitiae*; but that it was in the discretion of the inferior judges whether he would grant them; in this case the party appeared under a protestation against the citation; first, because the request was irregularly made jointly by two judges, and secondly, because the father had no interest to commence the suit. The first point only had been argued; it was clear she must be subject either to the jurisdiction where she last had a domicil, or to that where she was locally present; for to say she must follow the *forum* of her husband was begging the question, when the point in issue was whether she had a husband or not; which ever of the two judges had not the

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(a) *Dr. Pelling v. Whiston*, in which cause the refusal of a citation in a libel of heresy was holden to be a good ground of appeal to the Delegates. 1 Com. Rep. 190; 2 Gib. 1007.

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COURT.

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July 18.

jurisdiction, his act in joining in the request was merely void, for he could not devolve a jurisdiction which he had not; and in this case I thought she was subject to the jurisdiction of the Chancellor of London, notwithstanding she was locally present in that diocese by durance; for the statute says, that no person shall be cited out of the diocese or peculiar jurisdiction where the person cited shall be inhabiting and dwelling at the time of awarding or going forth of the citation or summons, and therefore she *being inhabiting and dwelling* in the Fleet at the time the letters of request were granted, and the citation issued, might have been cited by the Chancellor of London; and I thought, that notwithstanding the durance, she was citable where she was inhabiting pursuant to the statute, and great would be the mischief if a person by being in custody was privileged against being cited to do justice; persons often continued in prison for debt for many years, and had no other habitation. I therefore pronounced for the jurisdiction of the Arches Court, by virtue of the joint letters of request.

As to the other point, the suit being brought by the father, her proctor prayed time to the next term to extend his protest, and to consult his client; but that attempt being plainly to delay the cause and gain the long vacation, and as it was one of the objections to the citation upon which he was expressly authorized by his proxy to protest, I would not give further time, and Dr. Collier declaring he was not ready, and could not then argue that point, I rejected that part also of the protestation, and ordered her proctor to appear absolutely, and admitted the libel, it being a common libel of jactitation; her proctor then protested of appealing from the whole decree to the Delegates.

HIGH COURT OF DELEGATES.

JUDGES.

| | |
|-----------------------|---------------|
| Mr. Baron ADAMS. | Dr. DUCARELL. |
| Mr. Justice BATHURST. | Dr. CLARKE. |
| Dr. WALKER. | Dr. HARRIS. |

BUTLER *against* DOLBEN, calling herself BUTLER. June 30, 1757.

The Delegates determined that my decree was right as to the jurisdiction, by virtue of the joint letters of request, but were of opinion I should have given further time for hearing her objection as to the suit being brought by his father, and that I should not have decreed her to appear absolutely till I had heard her counsel upon that point, and therefore pronounced for the appeal, and assigned to hear upon that point the 11th November next.

Sentance in the proceeding cause affirmed by the Delegates, as to the jurisdiction by virtue of the joint letters of request, but that part of it reversed which directed the party to appear absolutely before counsel had been heard on the other branch of the protest.

PREROGATIVE COURT OF CANTERBURY.

By Day after
Trinity Term,
July 14.

POHLMAN, formerly UNTZELLMAN, and APPACH, formerly UNTZELLMAN, *against* UNTZELLMAN and others.

Dr. Hay, for Pohlman and Appach.—Peter Untzellman made his will 6th October, 1747, by way of provision for Elizabeth White, his intended wife, whom he made sole executrix, and for the children he might have by such marriage, and therein gives her, for the purposes aforesaid, all his estate real and personal, if the marriage took effect, which it did on the 10th of said October

A will made by way of provision for a wife, in contemplation of marriage, not entitled to probate in preference to a will of a later date.

PREROGATIVE
COURT.

By-Day after
Trinity Term,
July 14.

1747 ; 5th August 1751, he made a codicil, and added Israel Jalabert to his wife in the executorship : 12th March 1755, he made a new will, all of his own handwriting, appointed Nathaniel Torriano executor, who has renounced, gave his wife a legacy of 5*l.* only, and having no children, gave the residue to his sisters Pohlman and Appach for life, remainder to their children. Upon his death, the widow entered caveat and prayed probate of the will of 6th October 1747 ; the sisters prayed administration with the will of 12th March 1755 ; the widow opposed it ; the sisters propounded it and fully proved it ; and now—

Dr. Simpson, for the widow, insisted that the will of 6th of October 1747, was a provision or settlement made in view and consideration of marriage, and was in nature of a deed or marriage articles, and extended to his whole estate, and was therefore a bar to his making any other will, for it was in its nature irrevocable ; and also that the deceased had nothing left in his power to bequeath, and therefore prayed that the Court would pronounce against the last will as void, in the same manner as a feme covert's will, made without consent of her husband, is void, and that probate should be granted of the first will to Mrs. Untzellman.

JUDGMENT—SIR GEORGE LEE.

But I was of opinion, if the first will could operate as marriage articles or a deed, she must go to the Court of Chancery to have it enforced there ; that the question before me was only upon the factum of the two wills ; that, considered as wills the latter being fully proved, did clearly revoke the former ; and I could not determine that the de-

ceased had, by the act of 6th October 1747, disabled himself from making any subsequent will. He might have acquired an estate subsequent to said will, and then considering it as a deed, such subsequent estate would not pass under it, and so at all events he might have effects to bequeath. And this is not like the case of a feme covert who is rendered by the law incapable of making a will without the consent of her husband. I therefore pronounced for the will of 12th March 1755, and decreed administration *cum testamento* to the sisters as being residuary legatees for life, and, they living abroad, I ordered good security in 1000*l.* (which was admitted to be more than double the value of the estate) to be given in England. The widow's proctor prayed an inventory, she having a legacy of 5*l.* in the last will, and therefore having an interest; but the adverse proctor offering to pay the legacy, I refused to grant an inventory.

PREROGATIVE COURT.

By Day after
Trinity Term,
July 14.

LLOYD *against* LLOYD.

July 14.

John Lloyd, Esq. died 25th June 1755, left a widow, a brother, and two sisters. Upon deceased's death the widow delivered up the mansion house and every thing therein to the brother, and desired he would receive and pay deceased's debts and effects; afterwards, upon information that deceased had not long before his death made a will, and that there was reason to believe it was still subsisting, of which facts affidavits were exhibited, she prayed administration to be granted to her till a will should appear: the brother prayed a simple administration.

Administration
decreed to a
widow till a will
should appear,
in preference to
the grant of a
simple admini-
stration to a
brother.

PREROGATIVE
COURT.

By-Day after
Trinity Term,
July 14.

JUDGMENT—SIR GEORGE LEE.

I decreed the administration to the widow till a will should appear, she giving good security and notice thereof.

N. B. The brother in this case offered to make immediate distribution, but I did not think fit to grant administration from the widow on that account.

July 14.

RAMSAY against CALCOT.

A will made to secure a debt entitled to probate, although the testator was described as a mariner in the instrument.

Dr. Hay, for Mary Ramsay.—Benjamin Smith, deceased, made his will the 5th July 1751, appointed Mary Ramsay executrix and universal legatee; left a sister, Elizabeth Calcot, who took administration to him. Ramsay cited her to bring it in. She did, and opposed the will. Deceased was a prisoner for debt in Newgate. Instructions, reading, execution, and capacity proved. Hall, who wrote the will, says he believes it was made to secure a debt, but it does not appear that the deceased was a mariner when the will was made, and deceased had great obligations to Ramsay.

Dr. Bettesworth, for Calcot.—Ramsay, a stranger in blood to deceased; I shall put it upon this point, that deceased was a mariner, and the will was made to secure a debt, and therefore is void.

Witnesses for Ramsay.

1. William Hall, Gent.—On or about 5th July 1751, Frederick Bride, a client of deponent's, desired deponent to go to Newgate, to make a will for a person there; deponent went, and there was introduced to a person, a stranger to deponent,

who called himself Benjamin Smith ; said person gave deponent verbal instructions for making his will ; deponent drew his will therefrom and read it to him, and he approved it, and then duly executed it in presence of deponent, of Frederick Bride, and Margaret Preston, who witnessed it ; said person appeared to be of sound mind, and after he had executed it, said " Now I am easy."

PREROGATIVE COURT.
By-Day after
Trinity Term,
July 14.

3. Int. Deceased said he was indebted to Ramsay by bond. 7. Int. Deponent believes said will was made as a security for a debt.

2. Frederick Bride.—Deceased often came to see deponent ; Mary Ramsay told deponent deceased wanted to make his will, and desired deponent to recommend her to a person for that purpose, and desired Margaret Preston and deponent to be witnesses ; deponent was present at making the will ; proves that Hall read it to deceased, and deceased also read it himself, approved and duly executed it in presence of the subscribing witnesses, and was in his senses.

3. Int. Ramsay was a creditor to deceased ; she advanced money to him in his distress, and believes that induced him to make the will.

3. Margaret Filings, formerly Preston.—Deponent never saw deceased but once before she saw him in Newgate ; says Hall produced the will ready wrote ; deceased read and published it to be his last will ; he was in his senses.

The will read, in which deceased is described *mariner*, and it recited that he was considerably indebted by bond to Mary Ramsay.

JUDGMENT—SIR GEORGE LEE.

I was of opinion that the description of the de-

PREFROGATIVE
COURT.

By-Day after
Trinity Term,
July 14.

ceased by the name of mariner in the will, was not a sufficient evidence that he was really a mariner at the time of making the will ; he might have been so formerly, but might have left the sea ; and I was of opinion a testator ought to be proved to be an actual mariner at the time of making the will, and that it was made merely for the purpose of securing his debt to the creditor, in order to bring him within the equity of the statute of W. 3. For if a man's being barely called a mariner, and a witness saying that he believes the will was made to secure a debt was sufficient to set a will aside, it would be mischievous ; for then no seaman could appoint his friend executor, if he happened to be indebted to him ; and so a man's will might be set aside directly contrary to his intention ; and therefore the factum of the present will being sufficiently proved, I pronounced for the validity of the will.

Caveat Day,
July 20.

KEARNEY *against* WHITAKER.

Administration
decreed to a
bond creditor,
in preference to
another credi-
tor.

John Hewitt died a bachelor and intestate, 28th January 1756, left a brother, his only next of kin residing abroad, who was cited by process on the Royal Exchange, at the instance of Kearney, a creditor in 200*l.* by bond, who prayed administration, and offered to enter into articles to pay *pro rata*. He was opposed by Whitaker, another creditor, who made affidavit that deceased was indebted to him by bond in the sum of 279*l.* 15*s.*, and further, that deceased was indebted to him money he had received for him as his agent or clerk, but that account not being settled, he could not set forth the exact sum of that debt, and offer

ed likewise to enter into articles to pay Kearney PREROGATIVE COURT.
pro rata.

Caveat Day,
July 29.

Dr. Hay, for Kearney, argued that there being an unsettled account between deceased and Whitaker, it was uncertain whether deceased was indebted to him or not, and therefore that Kearney had a preferable right to administration.

JUDGMENT—SIR GEORGE LEE.

But as Whitaker had sworn to a debt of a superior sum to Kearney's by bond, and the unsettled account appeared to be an additional debt to the bond, (for according to Whitaker's affidavit, that debt arose from the deceased's having received money for the use of Whitaker, as his agent, and did not arise from any mutual transactions between them, which might create an uncertainty to whom the balance might be due,) I decreed administration according to the usual course to Whitaker, as being the greater creditor, he entering into articles according to his offer, to pay Kearney *pro rata* with himself, and ordered the expences Kearney had been at in citing deceased's brother, to be paid out of the estate.

KIRKHOUSE *against* FAWKENER.

October 8.

James Brand died a widower, intestate, in August 1746. Administration of his effects was granted to Mary Kirkhouse, widow, his cousin-german and next of kin. She died soon after, leaving goods unadministered. In October 1749, Kenelm Fawkener took administration *de bonis non*,

Where a person entitled to an administration is resident abroad, no decree which may affect his interest should be made till a proxy has been received from him.

PREROGATIVE
COURT.Caveat Day,
October 8.

as a creditor to James Brand, and suggested that Mary Kirkhouse had left no relations. John Brand Kirkhouse, son to said Mary, who resides at Scanderoon in Turkey, cited Fawkener to bring in the administration, and to shew cause why it should not be revoked, as granted under false suggestions, and why it should not be granted to him, as son and next of kin to Mary Kirkhouse. He having lived abroad, had not taken administration to his mother Mary, to qualify himself to take the administration *de bonis*, which Fawkener's counsel objected, and insisted that Kirkhouse had no right to cite him till he had actually qualified himself. It was answered, that he offered in the act of Court to take administration to his mother, and as he lived abroad, the Court would not insist on his taking administration to the mother previous to issuing this citation, but would decree both administrations together.

JUDGMENT—SIR GEORGE LEE.

I was apprehensive Kirkhouse's name might be made use of without his privity, as he lived abroad, and had suffered Fawkener to be in possession of the administration *de bonis* so long, and therefore declined making any decree relative to the administration, till Kirkhouse's proctor should exhibit a proxy from him.

October 8.

DOBSON against CRACHERODE.

Administration
with the will
annexed given
to a sister who
was a legatee,
in preference to
a brother not named in the will.

Richard Roderick, Esq. died intestate, as supposed; administration decreed to Elizabeth Dobson, widow, his cousin, and one of his next of kin.

Before it passed under seal, she found and brought in a will of deceased's, in which she had a legacy of 100*l.*, and legacies were left to her children, but the executor and residuary legatee died in deceased's lifetime. She prayed administration with the will annexed. Her brother, Colonel Mordaunt Cracherode, entered caveat, and prayed administration *cum testamento* to be granted to him, as one of the next of kin. His counsel insisted that it ought to be granted to him, being a man, and therefore preferable to a woman. There was no personal objection to either, and therefore as the simple administration (upon supposition that deceased was dead intestate) was decreed to Mrs. Dobson, and as she had, by virtue of her legacy, an interest by the will in her own right, and also in behalf of her children, and as Colonel Cracherode was not so much as named in the will, I decreed administration with the will annexed to Mrs. Dobson.

PREROGATIVE COURT.

Caveat Day,
October 8.

Sir EVERARD FAWKENER and FREEMANTLE
against JORDAN, by her Guardian.

2d Session,
Michaelmas
Term,
November 15.

Dr. Smalbroke, for Fawkener and Freemantle.—Colonel John Jordan, deceased, made his will, dated 10th September, 1754, all wrote with his own hand, but not witnessed; gave 50*l.* to his servant, Ruth Netterton, to be paid in six months; all the rest of his estate, which was wholly personal, he gave to his daughter and only child, a minor, aged near fifteen years, and directed that

The Court does not grant administration to trustees, merely as such.

Testamentary guardians can only be appointed by a will executed according to stat. 13 Car. 2.

Where a minor is sole next

of kin and residuary legatee, she may select a guardian for all purposes in law, and especially for taking administration *cum testamento* annexo.

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—
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an annuity of 100*l.* for her life should be bought for her; and then adds, that if she should marry without the consent of her guardians, she should have only one shilling, and bequeathed his estate in that case to the children of Mr. Freemantle, and desired Sir Everard Fawkener, Mr. Hitch, and the said Mr. Freemantle to take the trust and guardianship over his daughter. The daughter chose Mr. Hitch, one of the said trustees, her sole guardian, who entered a caveat. Sir Everard and Freemantle prayed administration, with the will annexed, to be granted to them two, or to Freemantle alone, or to them two and Hitch jointly. Hitch prayed administration *cum testamento* to be granted to him solely, as guardian to the minor. Hitch and Freemantle are both uncles to the minor. The Court may grant administration during minority at discretion—is not bound to grant it to trustees, *Prerog. Bodicott and Hamilton against Dalzeel*, last Term; *3 Peere Williams, Jones against Earl of Strafford*, Court not bound to grant it to the minor's nominee. Sir Everard and Freemantle first applied for administration.

Dr. Bettsworth, same side, urged that all three were executors by the tenor of the will, for the testator must intend they should buy the annuity for life for her, because no other person is appointed to do it; and they are trustees and guardians for the minor's person, by the intention of the testator, and therefore it will be agreeable to the testator's purpose to give them the management of the estate. The statute 12 Car. 2. does indeed empower a father to appoint guardians to his children by will attested by two witnesses, and therefore as this will is not attested, they are not strictly testa-

mentary guardians; but by the statute of frauds, PREROGATIVE COURT.
29 Car. 2. trustees may be appointed by writing without witnesses.

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Dr. Simpson, contra. — These gentlemen are clearly not testamentary guardians. A minor of seven years old may by law chuse a guardian. The Court may determine whether the minor has made a proper choice, but when the guardian is approved, the Court must grant the administration to him for the minor's use. This minor has both interests, as sole next of kin and residuary legatee, vested in her.

Dr. Hay, same side. — The three persons named in the will are trustees and guardians only of the minor's person. It is a common case, where administration by law is to be granted to a guardian elected by the minor for her use and benefit.

JUDGMENT — SIR GEORGE LEE.

I said an executor might be appointed by circumlocution, as well as by express words; but I saw no words of circumlocution in this will, and the parties seemed to agree there were none, for on each side they had prayed administration *cum testamento*. If executors had been appointed by the tenor of the will, the question would be at an end, for the Court must grant probate to them; but I thought there was no ground in this case to suggest that probate ought to be so granted. I did not know any instance where the Court, upon litigation, had ever granted administration to trustees, merely as such, without having any other title. They clearly were not testamentary guardians, for statute 12 Car. 2. having given

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power to fathers to appoint guardians to their children by their wills, which they could not do before, and having directed that such will should be attested by two witnesses, the direction of the statute must be strictly pursued, for want of which this appointment is void. Sir Everard Fawkener and Freemantle then, not having title to probate as executors, nor to administration either as trustees or guardians, and having no interest under the will, they were quite out of the question, and consequently this must be considered as a common case, where a minor who was sole next of kin and residuary legatee had chosen a guardian for all purposes in law, and especially for the purpose of taking administration *cum testamento*. The Court might judge of the fitness of the person chosen by a minor for guardian, and might refuse to grant guardianship to an improper person; but when (as in the present case) a person was chosen by the minor against whom there was no exception, and the Court had appointed him guardian, he was entitled to the administration for the benefit of the minor. Here the whole interest was in the minor, both as next of kin and as residuary legatee; and if she had been of age, the administration *cum testamento annexo* must have been granted to her, and while she was in minority, her guardian, duly chosen and admitted by the Court, stood in her place. I therefore decreed the administration *cum testamento* during her minority to Mr. Hitch, as guardian, for her use and benefit, and swore him administrator accordingly.

KIRKHOUSE *against* FAWKENER.

James Brand died intestate at Scanderoon. The consul appointed Messrs. Stratton, Fitzhugh, and Free, merchants, to take care of his effects in Turkey, till a proper representation should appear. Mary Kirkhouse, widow, his cousin and only next of kin, took administration to him in the Prerogative in 1746, and died intestate, leaving goods unadministered. She left a son, John Brand Kirkhouse, her only child, who resides at Aleppo. In 1749, Kenelm Fawkener took administration *de bonis* to Brand, upon suggestion that Mary Kirkhouse left no relation. In 1752 and 1753 John Kirkhouse wrote to Mr. Stratton, (who was then come to England) to get Brand's effects out of the hands of Fawkener, and also lately wrote to Mr. Free, (who was also come to England) to the same purpose. Free directed Mr. Stevens, a proctor, to take out a citation to call Fawkener to bring in his administration, and shew cause why it should not be revoked, as obtained under false suggestions; and to shew cause why it should not be granted to him, as son to Mary Kirkhouse, deceased's sole next of kin. Mr. Collins appeared for Fawkener, and objected that Stevens had no proxy; that it did not appear that John Kirkhouse was son to Mary Kirkhouse, and if he was, he had no right as son, not having taken administration to his mother, and therefore alleged that the administration to Fawkener ought not to be revoked, but his client ought to be dismissed with costs.

PREROGATIVE COURT.

2d Session,
Michaelmas
Term,
November 24.
The exhibition
of letters of ad-
ministration
holder to be
tantamount to a
proxy.

JUDGMENT — SIR GEORGE LEE.

I ordered Stevens to exhibit a proxy (a), and on

(a) *Supra*, p. 325.

**PREROGATIVE
COURT.**

**Michaelmas
Term,
November 24.**

this day Stevens produced the aforesaid letters, annexed to affidavits. The counsel for Fawkener admitted those letters did amount to a proxy, and the affidavits proved John to be the only child of Mary Kirkhouse, the administratrix ; so that the only question was, whether the administration to Fawkener could be revoked upon this citation, John not having taken administration to his mother, to qualify him take administration *de bonis non* to James Brand. But as it was clear that Fawkener had obtained the administration *de bonis non* under false suggestions, and that Kirkhouse in right of his mother, was entitled to all the effects of James Brand, after his debts paid, and was prevented taking administration to his mother to qualify himself to take the administration *de bonis non*, by residing in Turkey ; I revoked the administration granted to Fawkener, but without costs, and decreed commissions to Aleppo, returnable the last session of next Easter Term, to swear John Kirkhouse administrator, first, to his mother, and then administrator *de bonis non* to James Brand.

November 24.

WATSON against MILWARD.

Where the Court has decreed a commission of appraisement and an inventory, and afterwards granted an administration, the cause is not at an end till the inventory has been accepted and allowed to be complete.

Thomas Watson died intestate on the 18th October 1756. Milward made oath that he was a creditor to deceased in upwards of two hundred pounds, and prayed a commission of appraisement, and an inventory of goods disposed of, to be exhibited by the widow, which the Court decreed. Trenley, proctor for Milward, did not take out the commission of appraisement, but on the 6th November 1756, Sarah Watson took administration to her deceased husband, and at the same time

exhibited an inventory *bonorum dispositorym*. Trenley objected to the inventory that several things were omitted, particularly the lease of his house, which he had for a long term of years, and now prayed a commission of appraisement. Bellas, proctor for the widow, insisted that the cause was at an end by the widow's having taken administration, and exhibited an inventory, and that Trenley could now have a commission of appraisement, but must take out a new citation against the widow to exhibit a further inventory.

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JUDGMENT—SIR GEORGE LEE.

I was of opinion the cause was not at an end by giving in an inventory, but that she remained before the Court till the inventory was accepted and allowed to be complete; and that Trenley had a right in this cause to plead omissions in this inventory, and to call for a further inventory; and as a commission of appraisement had often been determined to be only a more solemn inventory, and as there were affidavits of omissions in the inventory exhibited by the widow, I thought Trenley was now at liberty to pray a commission of appraisement, and accordingly I decreed such commission, and directed it to go out *ex parte*, if Bellas does not name commissioners in ten days.

HAYWARD *against* DALE.

4th Session,
Michaelmas
Term,
December 8.

James Hayward deceased was a mariner in the Rhoda, bound to the East Indies; he made his

of a co-executor, or even after his death, if administration with the will annexed has not been granted to any other person.

An executor
may retract a
renunciation
during the life

PREROGATIVE
COURT.

Michaelmas
Term,
December 8.

will dated the 1st November 1757, made his wife Ann Hayward universal legatee, and appointed her and Michael Dale executors; deceased delivered his will to his wife, and she being very ill in January 1755, delivered it to Dale, who never would return it to her; deceased in his voyage home was pressed, and in endeavouring to escape was drowned; Dale immediately took probate without the knowledge of the widow; he then informed her of the death of her husband, that he had taken probate, that the estate was insolvent, and advised her to renounce; and on the 25th October 1756, Dale came with her to the Commons, where she did renounce, but being afterwards informed there were assets beyond the debts, on the 19th November 1756 she retracted her renunciation and was sworn executrix; Dale entered a caveat, and insisted she could not retract. The question was, whether she could by law retract her renunciation and take probate in the lifetime of her co-executor?

JUDGMENT—SIR GEORGE LEE.

I was clearly of opinion she might retract her renunciation at any time during the life of her co-executor, or after his death, before administration with the will annexed was granted to another. I therefore admitted her retraction, decreed probate to her jointly with Dale, and condemned him in 1*l.* 6*s.* 8*d.* costs.

**MACHIN and TYNDALL against GRINDON and
Others.**

A codicil bearing date in 1755 was propounded and pleaded to be all written by the deceased. The adverse party pleaded on the contrary, that it was not his handwriting, and pleaded in supply of proof several receipts dated in 1752, which were alleged to be deceased's handwriting, and to differ from the codicil both in the character and the manner of spelling.

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December 8.

Exhibits in the
handwriting of
an alleged testa-
tor allowed to
be pleaded as
evidence to
show dissimi-
larity of hand-
writing.

Dr. Simpson objected to these exhibits, as having been written three years before the codicil, in which time a man's handwriting might greatly vary, and therefore they could be no evidence to prove the codicil not to be deceased's handwriting.

JUDGMENT — SIR GEORGE LEE.

But I was of opinion they are a species of evidence that may induce a probability for or against the codicil, and that such exhibits have always been received as evidence, and therefore I admitted them.

BARROW against BARROW and Others.

By-Day after
Michaelmas
Term,
December 11.

John Barrow deceased got one John Taylor, a barber, to make his will, bearing date the 7th November 1752, in which he gave his wife all, except a few small legacies, and appointed her sole executrix ; deceased lived at Laleham, in Middle-

No instance of
probate having
been granted of
a copy of in-
structions.

By the law of
England, a co-
dicil is not de-
stroyed by the
burning of the will to which it originally belonged. In such a case a codicil may become a sub-
stantive instrument, and be *per se* entitled to probate.

PREROGATIVE
COURT.
By Day after
Michaelmas
Term,
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sex, and was head gardener to —— Wood, Esq. of Littleton, in that neighbourhood ; deceased always expressed the highest affection to his wife. On the 13th September 1756, he being ill, requested his said master, Mr. Wood, to come to him, which he did, and he then asked deceased whether he had made his will, he said he had, and had made his wife executrix, and expressed great satisfaction therein, and said he had given her almost all, and cut off his brothers with a shilling ; Mr. Wood said that looked unkind to them, and was unnecessary, and asked him if he had disposed of the residue ; deceased said he did not know what the residue meant ; Wood explained it, and said he might give his wife the residue by a codicil if he had omitted it in his will ; deceased desired Wood to make a codicil to give the residue to his wife, which he did, and deceased signed it, and Wood attested it ; the same day deceased expressed great pleasure at Mr. Wood's having made his will for him, and declared great affection to his wife, and immediately sent to Taylor to desire he would bring his will to him which was left in Taylor's hands ; deceased soon after burnt said will, saying, it was useless, Mr. Wood having made his will for him, deceased died on the 25th September 1756 ; soon after, his widow applied to Taylor, who made said will, to give her a copy of it, which he did after some importunity ; the widow then cited the next of kin, (for deceased had no children), to shew cause why probate should not be granted to her, with the copy of the will bearing date the 7th November 1752, together with the codicil dated the 13th September 1756 annexed, or why administration with the said codicil alone should not be granted to her. Joseph

Barrow, one of deceased's brothers appeared and opposed both said copy of the will and the codicil and prayed the Court to pronounce the deceased to be dead intestate. Trenley, proctor for the widow propounded said copy and the codicil; the brothers pleaded that said copy was not a true one, and that by the instructions from which the destroyed will was drawn legacies were left to deceased's brothers in case the widow married again; and the residue was given to them after her death, and exhibited a copy of the said instructions, and at the hearing prayed that deceased should either be pronounced to have died intestate, or that the widow should be obliged to take probate of said copy of instructions, together with the codicil.

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COURT.
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Term,
December 11.

N. B. The widow, in her answers to the brother's allegation, confessed that she was now informed and believed the copy propounded by her is not a true copy of the will, and confesses the article to be true in which Joseph pleaded that the destroyed will was agreeable to the copy of instructions pleaded and exhibited by him. John Taylor swore to instructions for the destroyed will, due execution, &c., and that the will was agreeable in every respect to those instructions, and that the copy of instructions exhibited is agreeable to the original instructions, and that the propounded copy of the will is not a true copy of it, that he gave that copy to the widow, but left out that part relating to her marrying again, believing it would be disagreeable to her. Mr. Wood proved the facts relating to the codicil, and other witnesses proved that deceased declared great satisfaction in Mr. Wood's having made his will for him, and his affection for his wife, and that thereupon he

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By Day after
Michaelmas
Term,
December 11.

sent for and burnt the will of the 7th November 1752.

The questions were, whether probate should be granted to the widow of the propounded copy of the will, together with the codicil, or administration with the codicil alone as the widow prayed, or whether probate should be granted to her of the copy of the instructions, together with the codicil, or whether this will itself being destroyed by the deceased, the codicil as a part of it was not destroyed with it, and consequently the deceased died intestate; one of which alternatives the brothers prayed the Court to pronounce for.

JUDGMENT—SIR GEORGE LEE.

But I was of opinion the propounded copy could not be pronounced for, because it was confessed and proved not to be a true copy, nor had copies of instructions ever been established; the original instructions had often; nor could these be pronounced for, because they were not propounded. As to the codicil, I was clear that by the law of England, it was not destroyed by the burning of the will, but was a substantive instrument or testamentary schedule, and as in this case the testator intended to die testate, considered it as his will, and declared he intended his wife should have almost all, agreeably to the codicil, I pronounced for the validity of it as a testamentary disposition, and decreed administration to the widow, with that schedule annexed, and swore her administratrix in Court; but at the desire of the proctor for the brother, ordered that the letters of administration should not pass under seal till after fourteen days. The brother prayed costs, but I gave none on either side.

PREROGATIVE
COURT.MASTER *against* STONE and POOLE.

Dr. Hay for Thomas Master.—John Stone, carpenter of the Rose Man of War, died on 10th January 1755, at Deptford. Amy Stone, as widow to deceased, and also as executrix of a former will, entered caveat against proving deceased's last will, dated 7th January 1755, in which Thomas Master was appointed executor. Master denied her to be deceased's widow, but admitted her to be a contradicitor to the last will. Hughes proctor, for Master, gave in a common condit, and examined two of the subscribing witnesses, viz. Peter Marriage the writer, and Henry Cradick, who was boatswain of the Rose; the third witness, Stuart, who was surgeon's mate of said ship, and attended deceased in his last illness, could not be examined, he being gone to sea. Cheslyn, proctor for Stone, pleaded her marriage to deceased on a certain day; Hughes on the contrary pleaded that deceased was at that time married to another woman who was still alive, but it was afterwards agreed by the proctors in acts of court, not to examine on either side to the interest. Deceased by his last will gives a shilling to his daughter, and all the rest to his friend Thomas Master, and appoints him executor. Master fetched the writer to deceased, but did not stay in the room while he gave instructions for the will; full evidence of execution and capacity.

Caveat Day,
January 8.

Not proved that
the will of a
carpenter of a
man of war was
made to secure
a debt, and if it
had been prov-
ed, the facts of
the case would
not have brought
it within the
operation of the
statute of W. 3.

Dr. Bettesworth for Amy Stone.—In the first will dated 8th September 1742, deceased styles Amy his wife; we propounded a marriage on 8th February 1740, at St. George's church, and birth

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of a daughter on 6th April 1742, who is now living ; but afterwards it was agreed not to proceed on the interest. Master was related to deceased only by being cousin to Amy Stone ; deceased died on Friday, 10th January 1755, he was taken ill the Saturday before, and from that time was in a stupid condition. Master importuned him to make a will to secure a debt deceased owed him, and swore he would not leave him till he had made a will ; Master went to one Curry to make the will, who declined it, and then he got Peter Marriage to make it ; I admit that a factum of the will is proved, but I object that it was made to secure a debt, and that deceased did not do it as his free voluntary act, but was compelled by Master to make it.

Witnesses for Master.

1. Peter Marriage, writing master.—Master came to deponent on 7th January 1755, to make a will for John Stone, who lodged at Charles Poole's at Deptford, whom deponent had seen, but was a stranger to him ; deponent went with him to deceased, and Master told deceased that deponent was come to make his will, and then Master went out of the room ; deceased told deponent that master was the only friend he had in the world ; and if he had never so much he would leave all to him, and then gave deponent instructions conformable to the will ; deponent took them down in writing and then went home and filled up the blanks in a printed will, and carried it to deceased and read it to him in presence of Thomas Stuart his surgeon, and of Henry Cradick ; deceased approved and executed it in their presence,

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and they attested it; verily believes deceased was of a sound mind, for he talked sensibly.

9th Int. Deceased executed the will readily and of his own accord. 10th Int. He sat up in his bed and executed it without assistance. 12th Int. Deceased delivered the will to Master. 15th Int. Deponent in the will styled Master brother to deceased; deceased said he was not his brother, and bid deponent style him his friend, and deponent altered the will so. 20th Int. Thomas Stuart, one of the witnesses to the will, is beyond sea.

2. Henry Cradick.—Deponent was boatswain of the Rose when deceased was carpenter of it; Master came to deponent and desired him to go to deceased, who told deponent he had a will and power to make, and asked deponent to witness them; Stuart then came in and asked deceased if the will was to his mind; deceased said it was, and that he had no friend but Master, and if he had a thousand pounds he would give it to him; proves execution and capacity; the will was read to deceased in deponent's presence by Marriage and Stuart.

9th Int. Deceased executed it of his own accord. 10th Int. He was not assisted in executing it. 12th Int. By deceased's desire Master took the will. 20th Int. Stuart is surgeon of a ship and is now at sea.

Witnesses for Stone.

1. Ann Poole.—Deceased lodged at deponent's house for five weeks before his death; he left Amy Stone his widow, and Sarah Stone his daughter, aged about fourteen; deceased was taken ill the Saturday before he died, which happened on the Friday, and from that time was stupid and unfit

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to make a will ; Master several times asked him to make a will to him, but deceased refused, and said he had made a will and had no call to make another, but Master insisted he should make a will to secure the money deceased owed him, and said " I will not leave the house till I have a will made to secure my money," and was in a great passion ; Master staid at deponent's house all the Monday night without going to bed, and on Tuesday morning, 7th January, he asked deponent who made wills in that town ; deponent recommended him to Mr. Curry ; Master went twice to Mr. Curry, but he did not come ; Master then asked deponent if there was nobody else that made wills ; deponent told him of Peter Marriage, and he went and fetched him ; Master insisted deceased should make his will ; deponent was not turned out of the room, but might have staid if she had pleased ; believes deceased did not know of a person being sent for to make his will ; Master on the Monday night took deceased's keys and possessed himself of his effects in his cabin, deponent heard deceased say he had about 120*l.* besides his tools ; has heard Master was related to deceased by marriage.

1. Int. Deceased was indebted to respondent's husband, and Amy Stone has promised to pay the debt if she prevails. 2. Int. Deposes that deceased spoke slightly of Master.

2. Susan Board.—Deponent was nurse to deceased ; he lay in a stupid condition, could give a sensible answer to a single question, but could not to two questions together ; believes he had not sense enough to make a will ; Master on the Monday told deceased he owed him twenty pounds and how should he get it, and insisted on his

making a will, agrees with the former witness on ^{PREROGATIVE COURT.} all particulars.

3. Int. Respondent don't know deceased had any regard for Master.

Caveat Day,
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3. Edward Curry, Attorney at Law.—Master came to deponent to make deceased's will, but deponent did not go.

Witnesses on 2d allegation for Master.

1. Henry Cradick.—Deceased expressed great affection for Master, and used to say he would give him all at his death, and deceased used to damn his daughter and curse Amy Stone, and declare he would hang her if he could, and expressed great hatred to her; Master did not take possession of deceased's cabin till after he was dead.

2. Peter Marriage.—Deponent never spoke to deceased but about the will; Poole and her sister Board went out of deceased's room of their own accord when he was going to give instructions for his will.

3. Elizabeth Hill, widow.—Deponent well knew deceased; there was great intimacy between him and Master; deponent has heard deceased say he would leave all to Master and make him executor, and said he was afraid he should not leave him enough; deceased expressed great dislike to Amy Stone, and said he would leave her nothing; on Sunday, 5th January, deceased told deponent he hoped Master would come to him the next day.

4. John Heath.—Deceased and Master were much together; deceased frequently expressed great affection for him, and did so express him-

**PREROGATIVE
COURT.** self a short time before his death, he expressed great dislike to Amy Stone.

Caveat Day,
January 8.

JUDGMENT — SIR GEORGE LEE.

Upon this evidence I was of opinion deceased's capacity and his free and voluntary making of the will was sufficiently proved, and that its being made to secure a debt was not sufficiently proved ; but supposing one view in making the will had been to secure a debt the deceased owed to Master, I thought that would not bring this case either within the letter or the meaning of the statute of King William, for Master appeared to be the deceased's intimate friend, to whom the deceased frequently declared he would leave what he had, and was not his landlord, and besides the deceased was an officer of the Rose Man of War, and not a common mariner. I therefore pronounced for the will, and decreed probate to Thomas Master.

January 8.

PHILIPSON and D'ESCHERNEY *against* HARVEY.

The Prerogative Court can not take notice of the statute of limitations.

In a case of bankruptcy, affidavit of the amount of a debt is properly made by one of the assignees.

Michael Harvey, Esq. died intestate ; administration of his effects were granted to his sister and next of kin ; Philipson and D'Escherny, assignees under a commission of bankruptcy against one Thomas Ranson who was a creditor of Michael Harvey's, took out a citation against Frances Harvey, administratrix of her brother, to exhibit an inventory and account of his effects. She appeared and prayed an affidavit of the debt. Christopher Philipson made affidavit to this effect, that deponent is one of the assignees of Thomas Ran-

son, and that deceased was indebted to Ranson upwards of forty-five pounds, as appears by Ranson's the bankrupt's books, no part of which as he verily believes has been paid ; objection was taken on behalf of Mrs. Harvey, that administration was granted to her in 1748, and therefore the statute of limitations runs against the debt, and that the affidavit ought to have been made by the bankrupt himself and not by his assignee.

PARDONATIVE
COURT.

Caveat Day,
January 8.

JUDGMENT—SIR GEORGE LEE.

But I was of opinion, first, that I could not take cognizance of the statute of limitations, that would be properly pleadable in an action at common law for this debt ; it was sufficient for this court to decree an inventory and account that there was an appearance of a debt ; and secondly, as all the bankrupt's effects and credits were vested in the assignees, I thought the affidavit of debt was properly made by one of the assignees, and assigned Mrs. Harvey to exhibit an inventory and account, and condemned her in 1*l.* 6*s.* 8*d.* costs.

COURT OF PECULIARS.

PARTINGTON *against* the RECTOR, CHURCHWARDENS, &c. of BARNES in SURRY.

2d Session,
Hilary Term,
January 27.

Dr. Hay for Mrs. Abigail Partington.—1st November 1754, citation issued against the rector, &c.

to an inhabitant, it should be matter of preliminary consideration—1st, Whether such a grant would be prejudicial to the parish ; 2dly, Whether it would be prejudicial to the persons opposing the grant ; and 3dly, Whether the party applying for it is, from station and property in the parish, qualified to have such a grant.—Faculty granted.

When the Court grants a faculty to appropriate a seat in a church

PECULIARS.

Hilary Term,
January 27.

of Barnes, with intimation to shew cause why a faculty should not be granted to Abigail Partington to appropriate a pew on the north side of the church four feet ten inches wide, and seven feet four inches long adjoining to a seat of Jacob Tonson, Esq. 12th November 1754, Mr. Skelton, proctor, appeared for William Hutchins, Richard Edwards, Charles Rix, John Shuter and William Shrigley, and alleged them to be parishioners and inhabitants of Barnes, and in their names opposed the grant of the faculty, suggesting that Mrs. Partington is a lodger only, and that the pew is an office pew in which the churchwardens sat, and that the pew will hold eight persons; 13th January 1754, Mrs. Partington was seated in this pew by the churchwardens; a little before, the pewing of the church was altered and this pew was lengthened; we say it never was an office pew but was a common pew. Partington sat quietly therein from said 13th January to 22d September 1754, and then Rix on said Sunday climbed over the pew and took off the lock and seated himself there, whereupon she applied for this faculty; she lives chiefly at Barnes, has a mother, brothers and sister that live with her, she has 100*l.* a year freehold estate in the parish, and has a mansion house therein which she sets out to Lady Millbank, and for which she is rated to the parish taxes; she constantly attends divine service, and gave a scarlet cloth for the communion table, and six guineas towards new pewing the church; the five opposers subscribed only five shillings towards the pewing; the principal parishioners have consented to the faculty.

Dr. Bettesworth for the Opposers.—Besides the five named, several others oppose this faculty

because it is an improper pew to be appropriated to any one, and because Mrs. Partington is not entitled to have any pew appropriated to her; the intimation is irregular, for it prays that the pew may be appropriated to her and her family and servants for their use, without the usual words of limitation, viz. so long as she and they shall continue to inhabit in the parish; she lodges at a gardener's house, and is a spinster, and has 100*l.* a-year estate in the parish, part thereof is a house she lets out ready furnished; this pew is in a part of the church very proper for the churchwardens, and they have often sat there; she was placed by Taylor, her landlord, when he was churchwarden, and he gave her the whole pew and put a lock on it; the reason of opposition is the general inconvenience to the church, but some of the opposers are specially hurt.

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Witnesses for the Opposers.

1. John Blissard.— Deponent has been clerk of the parish of Barnes thirty-three years; Mrs. Partington lodges at the house of Taylor; proves dimensions of the pew; says it used to be called the churchwardens' pew, and they have no other seat of office; Taylor and Courtney, churchwardens in 1753, altered the pewing of the church, the pew in question will hold eight persons.

5. Int. Before it was altered it was a common pew for any parishioners. 6. Int. Partington was seated by the churchwardens in said pew in 1754, and quietly sat there till Rix, 22d September 1754, forcibly came into the pew: she gave a communion cloth and five guineas towards the pewing.

2. Matthew Preston.— Deponent always lived

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at Barnes. Partington is a lodger, and believes she has no family in the parish ; gives dimensions of the pew : for sixty years past the churchwardens have commonly sat in said pew, unless they had pews of their own ; they have no other office pew; it will hold eight persons.

5. Int. It was a pew for the churchwardens.
3. John Emmerton. — Deponent has always lived at Barnes. Partington has an estate in the parish ; for sixty years past the churchwardens sat in the pew in question. Forty-five years ago deponent was churchwarden and sat therein ; it will hold eight persons.

Witnesses for Partington.

1. James Courtney. — For six or seven years past, Partington has had an estate of upwards of 100*l.* a year in the parish. She rents Taylor's house, and has her mother, brothers, sister, and servants living with her. She is rated for her estate : the pew has never been appropriated to the churchwardens, or any others, to the deponent's knowledge for forty years ; the officers of the parish have not usually sat there in virtue of office ; deponent has served the offices, and never sat in said pew officially, and the officers now sit in the next pew. Partington has been a benefactress to the church, and gave a cloth of crimson for the communion table ; the pews being old, the parishioners unanimously agreed that they should be altered, and there is now room for forty persons more to sit in the church than there was before the alteration : the pewing was done by subscription, towards which, Partington gave deponent, who collected the money, six guineas, and William Shrigley gave five shillings, and the other parties

subscribed nothing. On the repairing of the pews, Partington having no pew, deponent and Taylor, who were then churchwardens, with consent of the principal parishioners, gave her that pew for her use, &c., and seated her therein, and put a lock on the pew ; Partington, her mother, brothers, and sister, sat quietly there for some Sundays, till Charles Rix forced himself into that pew, though he had then a seat in the next pew ; believes Rix has taken the key and placed two wands in the front of the pew to denote it to be the churchwardens' pew, though he was not at that time churchwarden ; John Emmerton, the witness, was seated in that pew, but he receives two shillings a week alms from the parish ; believes none of the parishioners are disturbed by Partington having the pew ; Hutchins and Edwards sit in the gallery and have pews to themselves there ; Rix, Shuter and Shrigley sit promiscuously in the body of the church ; proves certificate No. 1, of consent of parishioners to the faculty, and says some who have signed it are the most considerable of the parishioners.

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2. Samuel Taylor. — Deponent has lived at Barnes seven years ; Partington has a freehold estate of 100*l.* a year in the parish, and occupies a hop ground of five or six acres of her own ; she rents a house of deponent at twenty pounds a year, and resides there with her mother, brothers and sister in the summer, and has always a servant resident in the parish to look after the hop ground ; she is assessed for her estate ; deponent lives in part of his house and pays the taxes for it ; the pew in question was enlarged about a foot and half ; churchwardens have occasionally sat there, but the pew was never appropriated to

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them ; Partington gave a communion cloth, and towards repairing the pews she gave six guineas ; upon the alteration of the pews, Partington having none, deponent and the other churchwarden enlarged this pew and placed her therein, in which she was disturbed while she was sitting there by Charles Rix ; the pew will not conveniently hold above six persons ; John Emmerton has sat in this seat, and he told deponent Rix gave him sixpence each Sunday for sitting there with Partington, none of the parishioners will be prejudiced by granting the faculty.

3. James Preston.—Deponent has always lived at Barnes ; proves that Partington has 100*l.* a-year in that parish ; she resides at Barnes in the summer ; the pew was never appropriated, but the churchwardens and others have sat there occasionally ; the next pew is as convenient for the churchwardens ; deponent never sat in the pew as an officer ; proves the same as the other witnesses. Emmerton receives alms ; does not know any person will be prejudiced by the faculty.

4. Matthew Courtney.—The same as the other witnesses ; the pew was never appropriated to any one before Partington ; when Edwards and Hutchinsons were churchwardens they did not sit in said pew, but some churchwardens have sat there occasionally.

5. Richard Phillips, smith.—In the summer of 1754, deponent put a lock by Partington's orders on said pew ; Rix forced the door open, and took off the lock, and has put two wands in front of the pew ; Emmerton has sat lately in said pew, and deponent heard him say he had sixpence each time for sitting there ; he is an almsman ; on the 13th October 1754 Rix forced himself into this

pew, though the churchwardens offered to seat him elsewhere.

Four other witnesses to the same purpose.

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Witnesses for Opposers on the 2d Allegation.

1. Matthew Creston.—Partington lets her own house, and pays no taxes for the house she lives in; the churchwardens and overseers have sat in said pew when they thought proper, and some of them have continued to sit in their own pews; does not know that any parishioner is displaced by Partington; believes the alterations of the pews was convenient; Emmerton is now an almsman, but formerly was in good circumstances, he was churchwarden and sat in this pew then, and for several years after; many of the persons who have signed the certificate No. 1. of consent are in low circumstances, but they pay rates; William Hutchins pays more than all together that have signed it.

7. Int. Shrigley has left the parish since Michaelmas last.

2. John Blissard.—Partington is not rated for the house where she resides; the churchwardens have usually sat in this pew, but not all of them. Robert Singer and William Clark are displaced, and before the alteration of the pews, Rix, Shrigley, and Shuter used to sit in the pew in question, and Rix being churchwarden now sits there; Shuter is displaced, and has not another place allotted him; believes the alteration was not made with the consent of the majority of the parishioners or by order of vestry; does not think the alteration was unnecessary; Emmerton was in good circumstances, he did not sit in this pew for some

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years before the alteration; several who have signed the certificate No. 1. are poor.

2. Int. The pew was common; some churchwardens did, and some did not sit in it; Shuter and Shrigley, before this suit, were placed by the churchwardens in the next seat, and they offered to place Rix, but he refused.

3. Robert Singer.—In 1734 and 1735, deponent was overseer and churchwarden, and then sat in the pew in question; never sat there before or since; knows that several who had not seats sat in said pew when they were in office; does not know any person is disturbed or displaced by the alteration of the pews; Emmerton did not sit in this pew for many years before it was altered; Hutchins pays as much to the rates as all those who signed the certificate No. 1.

2. Int. Churchwardens sat in said pew by virtue of their offices.

4. John Emmerton.—The churchwardens for many years sat in this pew, and deponent sat there when he was churchwarden 53 years ago; deponent had formerly an estate of 40/. a year in the parish.

8th Int. Rix placed deponent in this pew and gave deponent sixpence for sitting there, and he had two other Sundays sixpence each for sitting there; five or six years ago deponent left the pew, being reduced in his circumstances.

Witnesses for Partington.

1. Beamish Hill.—Churchwardens did not sit in the pew by virtue of their offices; Shuter and Shrigley, before this suit, were seated by the churchwardens in the next pew, but Rix refused to be

seated. Alterations of the pews were made by order of vestry.

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1. Int. Deponent signed the certificate No. 1, several of the signers are poor, but pay rates.
2. Int. Partington has two maid servants.

2. Robert Mitchell.—Many who were not churchwardens sat in this pew; the pews were very ruinous before they were repaired; Emmer-ton had left and did not sit in this pew till he was hired to do so by Rix.

3. Stephen Gomb.—The same.

4. Mathew Courtney.—13th October 1754, Rix refused to be seated by churchwardens, and said he would sit where he pleased same as the others.

5. Samuel Taylor.—Rix sat in this pew before he was churchwarden; deponent offered to place him in next pew, but he refused to be placed.

1. Int. Deponent signed certificate No. 1, it was carried from house to house to procure hands, has often seen Rix and Shuter sit in this pew before it was altered.

Dr. Hay for Partington.—The intimation is regular; such intimation issued in the case of one Streatfield in 1721; the faculty will limit it to the time of her and her family's inhabiting in the parish; the opposers of a faculty must shew good cause why it should not be granted; she being a lodger is not an objection, as she has an estate in the parish, and it is proved that she has a family. The questions are, whether the pew is fit to be appropriated, and whether she is a person fit to have an appropriation? No one has even a possessory right in this pew, for all who sat there formerly

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Dr. Simpson same side.—Mrs. Partington was placed in this pew by order of the parishioners to the churchwardens; Rix does not claim a seat in this pew by any private right, but claims it as a churchwarden's pew.

Dr. Bettesworth for the opposers.—Rix has the approbation of the parish in what he has done, for they have chosen him churchwarden. Rix used to sit in this pew, and has been turned out, and therefore has an interest to oppose a faculty.

JUDGMENT—SIR GEORGE LEE.

I was of opinion that the objection to the intimation was not material; it was sufficient that it was a citation to call all persons interested, and that due notice had been given, for opposers had appeared and had joined issue. The Court was not obliged to grant a faculty in the terms of the intimation, but would grant it in terms agreeable to law; however I directed the register to take care that all intimations for the future should run to shew cause why a faculty should not be granted to appropriate a certain pew to it, and his or her family, so long as he, she or they shall continue to inhabit in the parish.

With respect to the faculty, I observed that the considerations on the grant of faculty were, *First*, whether the appropriation was prejudicial to the church or the parish in general? in which case, though the minister and churchwardens were the properest persons to shew cause, yet any other parishioner might oppose and shew cause if he

thought fit, because he had a general interest. *Secondly*, whether it would affect the rights of any particular persons? in which case the persons that would be injured only, or at least the churchwardens as guardians of the parochial rights of every parishioner, ought to oppose, and no other parishioner who would not be personally affected. The *third* consideration was, whether the person who sued for the faculty was fitly qualified to have such a grant? and to apply these considerations to the present case, I observed that it was clear from the evidence that the church or parishioners in general would not be hurt by granting this faculty; *2dly*, that the particular persons who opposed it would not be prejudiced, for they had clearly no right whatever, not even a possessory right, in this pew, for no one had been seated there before Mrs. Partington, but it was an open common pew where any one sat that pleased, and all the opposers were properly and conveniently seated elsewhere, except Rix, who refused to be placed, and had acted in a very unbecoming manner in attempting to seize the pew by force and to appropriate it to the churchwardens pending the suit; *3dly*; I was of opinion that Mrs. Partington was a fit person to have a faculty, for she had a good estate in the parish and inhabited there with her family, and though she did not live in her own house, yet as she had an estate in the parish, I thought that not material, and she had already a title to this pew, it having been allotted to her by the churchwardens by the order of the principal parishioners, who still desired she might have a faculty; I therefore decreed a faculty to Mrs. Partington to appropriate this pew to the sole use of herself and

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her family so long as she and they should continue to be inhabitants of Barnes, and I condemned the opposers in costs.

PREROGATIVE COURT OF CANTERBURY.

3d Session,
Hilary Term,
February 7.

DAME JUDITH LEIGHTON *against* LEIGHTON and Others.

An inventory refused to the widow of a legatee, where a testator has no effects at the time of his death, he having during his life conveyed all his personal estate by a bill of sale in consideration of a debt.

Dr. Simpson for Lady Leighton.—Lady Leighton is the widow of a legatee in the will of Sir Edward Leighton, Bart. deceased. 26th March 1756, he made his will, and appointed his sister Lettice Leighton and his son and daughter, executors and residuary legatees. Lady Leighton cited them to prove the will or shew cause why administration should not be granted to her, and to exhibit an inventory. On 1st Sess. Michaelmas Term, Lettice Leighton took probate and gave in a declaration *loco inventorii* in which she declares that deceased, by bill of sale dated 5th April 1756, granted to her, in consideration of a debt he owed her of 2,500*l.* all the personal estate whatever that he should die possessed of. We object to this declaration as not full or sufficient; the intent of an inventory is, that persons interested may have a clear constat of the estate; she does not exhibit the bill of sale, and upon her own shewing it is fraudulent, because the deceased continued in possession of all the effects to his death; it is a general conveyance of every thing he had, even of arrears of rent, and such generality is held at common law to be a mark of fraud.

Dr. Hay for Lettice Leighton.—Deceased was indebted to Lettice in the whole in 3,200*l.* for security, of which he made a bill of sale to her of all his personal estate, which she swears in the declaration is not near sufficient to pay his debt. Though she allowed deceased the use of the personal estate, and he was in possession of it, yet she expressly swears all the effects were hers and not his at the time of his death, and therefore she is not obliged to give a particular inventory of them ; and so this Court held in the case of *Smith and Oram*, (a) Michaelmas Term 1755. The executrix is sworn to give a true account only of deceased's effects, and these are not his effects.

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JUDGMENT — SIR GEORGE LEE.

I was of opinion that the declaration was sufficient, for she expressly swore the deceased had no effects at his death, for he had in his lifetime conveyed all his personal estate to her by bill of sale in consideration of his debt to her, and that the effects were not sufficient to pay that debt ; and therefore if the bill of sale was good, there were no effects to inventorize, and it would be putting Lettice to a needless expence to particularize the effects the deceased died in possession of, for knowing the species of the effects would be no assistance to Lady Leighton in controverting the validity of the bill of sale in a proper court, and as to exhibiting the said bill, it was needless to do it here, where the validity of it could not be tried. I therefore rejected Lady Leighton's petition.

(a) *Supra*, p. 256.

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4th Session,
Hilary Term.
February 17.

Probated decree of
an unexecuted
will.

BOWES *against* MALPAS.

Bridget Kettleby, widow, aged about 80, made her will dated the 15th December 1755, appointed Thomas Malpas, her apothecary, executor and universal legatee; she died the 20th December 1755; left two nieces; one of them, Elizabeth Bowes, opposed the will; it was not signed or executed by deceased, and the instructions for it were given by Malpas; but it appearing clearly from the evidence that the deceased was perfectly in her senses,—that she had ordered a will to be drawn for her, and approved of the writer who brought the will ready wrote to her, and read it distinctly to her, and she approved of it, and said she would give all to Malpas, and would have signed it if she had not had such a weakness in her hands that she could not write, and declared she believed it would do without signing, as there were witnesses enough to prove her intention, and at the same time ordered her keys to be delivered to Malpas in affirmation of her will, and bid him take possession of her effects; I pronounced for the validity of the will.

When a copy of a will is produced instead of an original, the instrument must not only be clearly authenticated, but it must be satisfactorily shewn that the original could not have been exhibited.

RAYMOND *against* the BARON DE WATTEVILLE.

Dinah de Larisch, *alias* Von Larisch, formerly Raymond, died a widow without children, at Hernhutt, in Upper Lusatia; she left Jones Raymond, Esq. her brother and next of kin; made her will on the 26th April 1756, attested by several witnesses, and appointed the Baron de Watteville

executor. Jones Raymond opposed it; De Watteville would have propounded a copy of the will, of which he had taken probate in common form in the Prerogative; in his allegation he pleaded that the original was deposited in Count Linzendorf's Court at Hernhutt, and the copy was under a seal, and attested by two private persons.

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—
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JUDGMENT—SIR GEORGE LEE.

I was of opinion I could not receive the copy upon this plea as it stood, but that he ought to plead that he could not produce the original because it was deposited in a proper Court at Hernhutt, that had jurisdiction of wills, and that the copy propounded had been duly examined and collated with the original by the proper officers, which facts must be proved by witnesses; for I could give no credit to a copy under an unknown seal of an unknown Court, and attested by unknown persons. I therefore directed the allegation to be reformed.

REEVES *against* GLOVER and Others.

Dr. Hay, for Reeves.—William Finch, Esq. died the 5th December 1755; left eight testamentary papers, which were found wrapt up together, which were brought into Court with an affidavit of scripts and scrolls, No. 1. and 2. which had been executed wills, but were cancelled; No. 3. a draft of the will No. 4. dated the 10th June 1743, on the back thereof was endorsed, “This to serve as a will till another is made in better form;” this paper was all of the deceased's handwriting, was executed by him, and attested by two witnesses;

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Trinity Term,
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An incomplete
will cannot ope-
rate as a revoca-
tion of a sub-
sisting will.

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No. 4. likewise wrote by deceased, dated the 20th June 1743, executed and attested by three witnesses, in which Sarah Finch, Samuel and Robert Nicholls were appointed executors, but the residue was not devised. Sarah Finch and Samuel Nicholls died in 1749, and Robert Nicholls disengaged deceased, whereupon he expunged all their names, and inserted with his own hand the name of Lucy Bradshaw as his sole executrix, and made a memorandum thereof with his own hand at the bottom of said will No. 4. On the 26th August 1751 Lucy Bradshaw also died, and then deceased struck out her name, and with his own hand inserted the name of Elizabeth Reeves as sole executrix in her stead. Codicil A. dated the 5th September 1751, in which Reeves is also named executrix, wrote by deceased. Codicil B. wrote by deceased subsequent to the 5th September 1751, for it begins, "My other codicil," though there is a date at the top of it, viz. "London, 3d September 1751," but that date is not deceased's writing, nor does it appear by whom it was wrote. Codicil C. without date, but it appears to be deceased's writing and to have been written by him in 1751; and lastly, a will marked D. in which Reeves was likewise executrix, but the residue was not devised. This paper is likewise written by the deceased, but it is not attested or signed by him otherwise than his name being written in the beginning of it; there is no date to this will, but on the back there is an endorsement in deceased's own hand, "wrote July 1752;" deceased died a widower, and left Robert Glover and Frances Puddiphat, widow, his cousins-german and only next of kin, but left a great number of more distant relations; on his death Glover entered caveat,

which was warned by Reeves the executrix, who confessed his interest; he opposed all the testamentary papers, and insisted, that from the uncertainty of which paper should be taken for the last will, the deceased was dead intestate. Reeves propounded the complete executed will No. 4. and examined two of the subscribing witnesses, and proved the handwriting, death and good character of the third; and also propounded the codicils A. B. and C., and cited Frances Puddiphat and all the legatees in the unexecuted will D. to see said will No. 4. and codicils A. B. and C. proved. Mrs. Puddiphat appeared, and as a principal legatee therein propounded the unexecuted will marked D. as a substantive will, and as a revocation of the will marked No. 4. and the three codicils, it being as suggested wrote in July 1752, subsequent to all the rest of the papers. Several legatees in the paper marked D. and the other papers also appeared, and prayed that the executrix might take probate of the will marked No. 4., of the codicils A. B. and C., and also of the paper D. as another codicil to said will No. 4.; paper D. had in it a devise of a small real estate; the three codicils were all unattested, and C. related to copyhold estates surrendered to the use of his will.

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Dr. Simpson, same side.—No. 4. is a complete executed will. Codicil A. dated the 5th September 1751, made soon after the death of Lucy Bradshaw; ratifications of said will by deceased in 1749 and 1751. Codicil B., the date not of deceased's writing; all the legacies in No. 4. are subsisting, though some of the trustees are dead. Codicil C. contains copyhold estates. The will D. is not supported by any declarations.

Prolocutor
Court.

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Feb. 25.

Dr. Smalbroke, for Puddiphat.—My client is one of the next of kin, and a legatee in will D. which was wholly written by deceased, and has an executor, date on the back of it July 1752, wrote by deceased; it was found wrapt up with the other testamentary papers; it mentions a real estate, which is described as a small freehold; deceased left a large personal estate. D. was a deliberate act; deceased declared he intended to leave the care of his affairs to Atkinson and Kidd if the last had not died before him. We admit affirmances of will No. 4. till September 1751; after that time he declared to Atkinson he would divide his estate among his relations, for he would make no one the great man. In codicils A. and B. there are three legacies to the same persons, and the same sums, and a fourth legacy in both, with the difference only of guineas instead of pounds. I shall insist that D. will operate as substantive will, and as a revocation of the former will, and that codicils A. and B. are inconsistent.

Dr. Collier, for the Legatees.—All the testamentary papers are propounded. We pray that will No. 4., codicils A. B. and C., and also will D. may all be pronounced for as one testamentary act; residue not disposed of in any of the papers. We insist that D. is a codicil, and may be pronounced for as such, though propounded as a will.

Dr. Bettesworth, for Glover.—Glover, as one of the next of kin, insists on intestacy, from the uncertainty arising from the variety of testamentary papers; but if the Court should be of opinion that deceased is dead testate, then we pray that D. may be pronounced for as the only last will, revoking all the former testamentary papers.

Witnesses for Reeves.

1. John Wake.—Deponent knew deceased 19 years; on 20th June 1743, deponent in deceased's warehouse saw him execute the will marked No. 4, and deponent and John Gilbert and Henry Wade attested it as witnesses; deceased was in perfect senses, proves No. 4, to be deceased's handwriting; Lucy Bradshaw is dead, but cannot say when she died; proves the memorandum at the bottom of No. 4, and words "Lucy Bradshaw" are deceased's writing; John Gilbert is dead; proves Gilbert's handwriting as a witness to will No. 4, and his good character; proves the codicils A. B. and C. to be all of deceased's handwriting, except the date London, September 3, 1751, at the top of codicil B, and some indorsements on the back of C.; knows not whose handwriting they are.

5. Int. Proves paper marked D. to be deceased's handwriting, except some indorsements on the back of it.

2. William Finch, Innkeeper.—Deponent was a relation to deceased; proves the name Lucy Bradshaw inserted in No. 4, and the note at the bottom thereof, and the name Elizabeth Reeves, inserted in said will, to be all of deceased's handwriting; Lucy Bradshaw died in 1751, and Sarah Finch in 1749; John Gilbert is dead, he died in 1746; proves his handwriting and good character; 19th February 1752, deceased was admitted tenant to a copyhold estate called Loudwater, mentioned in codicil C.; the said codicil is deceased's hand-writing; deceased died in December 1755, and on that day the several testamentary papers now before the Court were all found wrapt together and laid up in his bureau, where he kept papers of moment.

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4. Int. Deponent well knew deceased's handwriting; No. 3. is indorsed by deceased in these words, "This to serve as a will till another is made in better form."

Witnesses for Puddiphat.

1. John Atkinson.—Knew deceased above thirty years; in June or July 1752, deceased asked deponent about William Kidd, who had been ill; deponent told him he was dead; deceased said he was very sorry for it, for he intended to leave his affairs to said Kidd, and deponent replied he alone would take care of them; deceased said he would expect too great a reward, and then said he would divide his estate, and not make one great man.

2. Int. Deceased then said he intended to make a will soon.

2. Mary Kent.—Deponent was a relation to deceased; Sarah French, Lucy Bradshaw, and Samuel Nichols are dead; deceased had upwards of sixty relations; deponent has seen deceased write; proves D. to be deceased's handwriting.

Affidavit of scripts and scrolls made by Mrs. Reeves read by the counsel for the legatees; swears all the testamentary papers were found together.

All the propounded papers read.

Dr. Hay for Reeves.—Reeves is named executrix in will No. 4, in codicil A. and in paper D. The *first* question is, whether deceased is dead testate? Suppose D. was written subsequent to the other papers, it will not revoke them, unless it operates as a will; either that or No. 4. must be a good will, and consequently deceased cannot be dead intestate: the *next* question is, whether all the

papers can be pronounced for together as a will ? D. cannot be deemed a codicil, for it was intended to be a will, but it is incomplete, contains real estate, was written long before the testator's death, and therefore cannot be a valid will ; No. 4. is duly executed, was carried about by deceased, and affirmed by subsequent acts in 1749 and 1751 ; B. begins " My other codicil," implies that it was subsequent to former codicil A. An executed will shall for ever remain till it is revoked. *Delegates Hyde and Mason against Calamy and Limbrey*, (a) an incomplete will that cannot operate for the whole estate, shall not, without special circumstances, operate to revoke an executed one. *Prerogative*, 3d December 1750, *Barrow against Cox*, a will for real and personal estate wrote by deceased, his name inserted in the beginning, and it was confirmed by a codicil, but court held it could not revoke an executed will. Paper D. not of a certain date, but if it was wrote in 1752, it was three years before his death. The two cancelled wills were executed ones. Paper No. 3, dated 10th June 1543, which was only a draft for another will, was executed and attested, therefore deceased always intended to have an executed will. *Prerogative, Jekyll against Lady Ann Jekyll*, (b) A. refers to the will, B. refers to both the will and a former codicil ; C. also relates to a will ; if D. should be established, the greater part of his estate would fall under an intestacy, the residue not being devised.

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Dr. Simpson, same side.—Some of the same legacies are given in both A. and B., but there are some different legacies ; C. devises copyhold es-

(a) Vol. I. p. 423. *notes.*

(b) Vol. I. p. 419.

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states which are subject to this Court, for they pass by surrender, and a will is only a declaration thereof.

Dr. Meacham, same side.—Deceased had a settled intention to die testate from the year 1699; paper D. is not propounded as written in 1752.

Dr. Smalbroke for Puddiphat.—D. can never be considered as a codicil; deceased calls it his will, it is perfect as to intention, it is diffusive, for it provides for twenty-three relations; it was clearly written after all the other papers; deceased was not in possession of the Loudwater estate till Christmas 1751, and therefore D. which devises that estate, must be subsequent to all papers in 1751. Delegates, *Beaumont* and *Sharpe*, 1753, judges held that an inconsiderable real estate would not affect a will which conveys a great personal estate; 3 Mod. 218, *Hogk* against *Clark*, Swinb. fo. 502. D. cannot be reconciled with the other papers, and therefore cannot be a codicil.

Dr. Clarke, same side.—Deceased made variety of dispositions upon death of several relations; several circumstances shew will D. is the last wrote paper. An executed will may be revoked by one unexecuted, Crok. Eliz. 206, *Burton* and *Estoff*. Before the Statute of Frauds, a will might be revoked by parol; a paper may be sufficient to revoke though it does not operate as a will, Prerogative, *Hellyar* against *Hellyar*. (a)

Dr. Collier for the legatees.—Deceased left above forty thousand pounds residue, not given in No. 4, because he intended from time to time to devise by codicil; D. gives only about five thousand pounds; if that should operate alone, great part of his estate would go to the next of kin, and therefore he would make one great man contrary to his declaration.

PREROGATIVE
COURT.

By-
Day after
Hilary Term,
February 25.

Dr. Battersworth for Glover.—We contend for an intestacy. Prerogative, *Hunt* against *Green*, A. made his will duly executed, and gave all to his wife but two legacies, and devised therein real estate, wrote another will subsequent, attested by two witnesses; the last was held to revoke the former will, though it could not carry the real estate.

Dr. Harris, same side.—2 Inst. tit. 17 sect. 7. Vinn. Cod. testament revoked by a solemn will, or by a military one, where the usage is so. *Onyons* and *Tyler*, Chanc., a paper which could not enure as a will, was held to be a revocation of a complete will. Prerogative, *Martin* against *Wotton*, *Millechamps* made her will which was revoked by instructions only.

N. B. She died before she could execute the new will, Cases in Eq. Ab. *Hyde* and *Hyde*. *Comyns*, fo. 476. same case. *Moore*, 710, *Ryder's* case.

JUDGMENT—SIR GEORGE LEE.

I was of opinion, *first*, that the deceased was not dead intestate; either No. 4. or D. must be good and valid. *Secondly*, that D. could not be taken as a codicil, for it was inconsistent with the other

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papers, was designed for a will and not a codicil, and was propounded as a will : *thirdly*, if D. could operate at all it must be as a latter will, thereby revoking the former, for it could not operate as a revocation merely, and was not pleaded as such ; so held in Delegates in the cases of *Duke of Somerset* and *Sir John Jacobs*, and of *De Smith* and *Ployart* : *(a) fourthly*, that D. containing real estate which it could not convey for want of execution, and having been written so long before his death, and it also appearing from all the former wills that deceased intended to leave an executed will, and that he cancelled all the wills he had entirely departed from—that D. could not be established as a will to revoke the former complete executed will No. 4. and the codicils referring to it ; I therefore pronounced for the will No. 4. and the three codicils A. B. and C. ; but it appearing that the date at the top of B. viz. "London, 3d September 1751," was not deceased's handwriting, and it not appearing by whom it was written, I ordered that date to be struck out.

March 2. BREWOOD, Administration of HIBBIN, against CALEMBERG.

51. only decreed
on account of
the poverty of
the party nomine
expenses by
way of stigma-
tizing an unjust
and vexatious
suit.

General Frampton died in October 1749 ; after his death Mary Grace set up a paper as his will, in which she was executrix. The Countess Calemburg as first cousin once removed, and one of the General's next of kin, opposed the will ; Grace

(a) Vol. I. p. 425. notes.

admitted her interest as cousin once removed, and one of the next of kin. After a long litigation, I pronounced against the will as forged, and decreed administration to Calemburg. Grace appealed to the Delegates, where the sentence was affirmed in all respects, and the cause remitted to me. Elizabeth Hibbin, widow, entered a caveat, and then for the first time alleged that she was sister by the half-blood, viz. on the father's side, to General Frampton, and prayed administration. Calemburg denied her interest, and she would have denied Calemburg's interest, but as her interest had been admitted in this cause upon the contest concerning the will, and Hibbin had not intervened to oppose her interest, and this Court had pronounced for her interest upon Grace's admission, and that sentence had been affirmed in the Delegates, and thereby her interest had been established in a superior court, whose decree I could not vary from, I was of opinion that it was a *res judicata*, that Calemburg was cousin-german once removed to the deceased, and next of kin, unless it could be clearly shewn that the deceased had left a nearer relation, which at the time of the sentences was unknown to the Courts; and consequently, that Calemburg ought not now to be put to prove that she was cousin-german once removed to the deceased. Hibbin propounded her interest as sister of the half blood to the deceased. Pleas were given in on both sides, and many witnesses examined, then Hibbin died when the cause was almost ready for hearing, and her daughter Elizabeth Breewood, who was her administratrix, intervened and carried on the cause, and this day it came on to be heard, when it appeared that there was not the least colour of evidence to prove that Hibbin was any relation whatever to the

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deceased General Frampton; or that she had ever been acquainted with the deceased or his father Charles Frampton, who she asserted, was also her father, and who, in his will, dated April, 1723, gave no intimation of his having any other child but the deceased.

JUDGMENT — SIR GEORGE LEE.

I therefore pronounced against Hibbin's interest, and ordered letters of administration (pursuant to the former decree confirmed by the Delegates) to pass to Calemburg, and condemned Elizabeth Bree-wood, Hibbin's administratrix, in *5l. nomine expensarum*, to be paid out of Hibbin's assets (if any), and declared that as it appeared in the cause that Hibbin was very poor, I gave that sum only by way of stigmatizing such unjust and vexatious suits, and that if Hibbin had left sufficient assets to have paid them, I would have condemned her administratrix in full costs to the time of Hibbin's death; but I was of opinion her administratrix was not liable to pay costs out of her own pocket, as the witnesses had been examined and the cause was almost ready for hearing before Hibbin died.

On 21 June, 1757, an appearance was given for the Marchioness Paschall, who alleged herself to be first cousin to the deceased General Frampton; and Calemburg's proctor, Mr. Tyndal, who had been concerned throughout the cause, exhibiting a special proxy, whereby Lady Calemburg confessed Lady Paschall to be first cousin and next of kin to deceased, whereas she was only first cousin once removed; I decreed administration to Lady Paschall.

PREROGATIVE
COURT.

BOND against FAIKNEY.

1st Session
Easter Term,
April 28.

Robert Fotherby, Esq. deceased, made his will and two codicils; the will was dated 14th August 1749, the first codicil the 18th, and second codicil the 19th August 1749; he appointed his wife Dorcas executrix and residuary legatee for life, and after her death gave the residue to his sister Mary Faikney for life, remainder to his nieces, Mary and Elizabeth Faikney. In the first codicil were these words, explanatory of the will, viz. “*In case my wife shall think proper to marry, then my will is, that she and the persons who shall be entitled by my will to enjoy my estate as therein mentioned after her decease, do agree upon proper, able and honest persons to be trustees, and I do hereby direct my said wife my executrix to convey, assign and transfer and make over to the said trustees, all and every thing of my personal and real estate of what kind and nature whatsoever and wheresoever, which I have given to my said wife for her life, in trust for the uses of my said will, and my will is that a deed of trust shall be drawn and agreed on by counsel learned in the law to settle my said estate real and personal in the said trustees, in such manner as not to be subject to any debt or debts contracted by any husband before or after her marriage, and that they may receive the rents, profits and dividends arising as they become due, and pay the same over to her my said wife, or enable my said wife to receive the same, as she shall best like, and her receipt to be a sufficient discharge for everything I have given her by my said will notwithstanding her coverture; and my will is that my said trustees do likewise take care of my plate, jewels, and household furniture of all*

Where a widow is left executrix with a stipulation that in the event of her second marriage, she is to concur in the appointment of trustees for the management of the property, and she does marry again, but dies without the appointment of trustees, holden, that her executoryship expired on her second marriage.

PREROGATIVE
COURT.

Easter Term,
April 29.

kinds, allowing my wife the use of them for her life, but not to be subject as aforesaid to the power of an husband."

Dorcas, the wife, took probate of the will and codicils on the 2nd January 1749-50, and afterwards married Richard Bond; but, by settlement before marriage, she was empowered to make a will in writing. In June, 1753, she accordingly made such a will, and appointed her husband, Richard Bond, executor, who proved her will on 29th January, 1757. Mary Faikney, the sister of Robert Fotherby the first testator, died in the lifetime of Dorcas Bond, whereupon the residue, by the death of Dorcas, came to Mary and Elizabeth Faikney, nieces of Robert Fotherby. On the 5th January, 1757, Mary Faikney the niece, without alleging that Dorcas was dead intestate, prayed and obtained administration with the will and codicils of the goods of Robert Fotherby left unadministered by Dorcas Fotherby, but took no notice that Dorcas had died a *feme covert* and testate. Richard Bond, as executor of Dorcas, called Mary Faikney to bring in the administration, and shew cause why it should not be revoked as surreptitiously obtained, and why administration should not be granted to him as executor to Dorcas, through whom the privity between Bond and the first testator was continued. Dorcas and the reversionary residuary legatees did not, upon her marriage to Bond, agree upon trustees pursuant to the first codicil, so that she was at her death in possession of all the estate. Mary Faikney brought in the administration, and the question now was, whether the administration was improperly granted to her and ought to be revoked, and administration to be granted with the will

and codicils to Bond, as executor of the executor of Robert Fotherby or not.

PREROGATIVE COURT.
Easter Term,
April 28.

JUDGMENT — SIR GEORGE LEE.

I was of opinion, that though Trustees had not been appointed pursuant to the first codicil, yet that Dorcas's executorship, by the words and meaning of said codicil, expired on her marriage to Bond, and consequently that no privity was continued to him from the first testator, and therefore that the administration *cum testamento* was rightly granted to Mary Faikney, one of the now residuary legatees, and I confirmed the grant thereof to her.

—
ARCHES COURT OF CANTERBURY.

Cox against RICRAFT.

2d Session
Easter Term,
May 2.

Appeal from Peterborough.

Griffin Ricraft, warden of the parochial chapel of Eye, in the county of Northampton, promoted articles against Thomas Cox, for that he had, contrary to the laws, canons and constitutions ecclesiastical, cut off the head, or two great branches that form the heads of a large timber tree that stands in the chapel-yard of Rye, and made it a pollard, whereby it was in danger of decaying and becoming useless for defending the chapel against the south-west wind, and for that

The herbage of a chapel yard and the loppings of trees in it, by law belong to the incumbent. If a person is proceeded against for cutting down timber, under 35 Ed. 1. it must be by indictment at common law.

ARCHES
COURT.Easter Term,
May 2.

he had carried it away and applied it to his own use, and not for repairing the chapel; and for that he had pulled down six or seven feet of the wall of the chapel yard for the more convenient carrying it away: the fact was fully proved that he did lop the tree, carried the branches away for his own use, and did pull down part of the chapel-yard wall to carry the loppings away; but it appeared that the rectory of this parish was appropriated to the see of Peterborough; that the bishop was lord of the manor as well as incumbent and ordinary, and nominated the curate; and that he had granted a lease of the tithes and appurtenances of this parish to the said Thomas Cox, and had, as rector, consented that said Thomas Cox might lop the tree in question, which consent the bishop certified under his hand, and the certificate was exhibited in the cause and proved; and it was also proved that Cox did immediately, and long before the prosecution was commenced, build up the chapel-yard wall again, and had put it into as good or a better condition than it was in when he pulled it down, and that several of the principal parishioners were averse to the prosecution.

On the 9th June, 1756, the Chancellor of Peterborough pronounced that Cox did unadvisedly and illegally cut timber from a tree in the chapel-yard of Eye, and did illegally pull down part of the yard wall, for which offences he ought to be censured and admonished, and condemned him in costs, and admonished him to pay them, but did not admonish him for the facts of lopping the tree and pulling down part of the yard wall.

From this decree Cox appealed to the Arches.

JUDGMENT—SIR GEORGE LEE.

I was of opinion that the herbage of the chapel yard and the loppings of the trees did by law belong to the incumbent; that Cox being the lessee of the incumbent, stood in his place, and having also his express consent for lopping this tree, was guilty of no offence against the ecclesiastical laws, for the Constitution in Linwood of Archbishop Stratford's declares the trees in a church-yard are the property of the parson, and does not subject him to punishment even for cutting them down, but only punishes the parishioners in case they cut down trees in the church-yard without the parson's consent; that if the constitution had prohibited cutting down trees except for repairing the church, as penal laws are not to be extended beyond the letter, it would not include this case of lopping only. The statute 35 Edw. 1, *ne Rector prosternat arbores in caemiterio*, does not prohibit the parson from lopping trees in the church-yard, but prohibits him from cutting them down except for the repairs of the church; and if a parson is prosecuted upon that statute, it must be at common law by indictment. I was therefore of opinion that Cox, by lopping the tree, had not offended against any ecclesiastical law, and that the Spiritual Court had not jurisdiction over him in this case; that he had done wrong in pulling down the wall of the chapel-yard, but as he had immediately and voluntarily built it up again before any prosecution was begun, I thought this prosecution trifling and malicious. I pronounced for the appeal, and reversed the decree of the judge below with costs.

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COURT.
—
Easter Term,
May 2.

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COURT.

May 20.

WHEATLEY *against* FOWLER.

(Appeal from Norwich.)

A methodist
preacher arti-
oled for against
incontinence.
The inconti-
nence proved ;
penance en-
joined.

John Fowler promoted articles against James Wheatley, a methodist preacher, who had a congregation at Norwich ; the citation was returned on 24th September, 1754 ; appearance for Wheatley in October following. The articles charged him with incontinence in several months in the years 1753 and 1754, with Mary Mason, formerly Fowler, daughter of the promoter, and with — Martin, Rebecca Payne, and Frances Bryant, and others. On the 17th December 1754, Fowler's proctor alleged that he had cited Mary Mason to answer to articles for fornication or adultery with Wheatley, who was then a married man, and that she had appeared and been enjoined penance, which she had performed, and prayed an answer. Wheatley's proctor confessed his allegation to be true, and then she was produced, sworn and examined a witness against Wheatley.

Mary Mason swore that some time in March, April, May, or June, 1753, at which times she was a spinster, Wheatley, who was then married, and lodged at Mr. Jermy's house in Norwich, did several times attempt to debauch her, and did in Jermy's garden, in some of said months, first begin to corrupt her virtue ; deponent being averse, he used arguments to persuade her, and prevailed on her to consent in some of said months ; and on a Sunday in some of said months, after she had been at his preaching, in an arbor in Jermy's garden, he first had carnal knowledge of her ; he tempted and prevailed on her to repeat the said conversation several times in said arbor, in the parlor, and in

other places in his said house or lodgings; next day after he had first lain with her, she expressed her uneasiness at what she had done, and he advised her to say nothing of it to any body; he had a bible with him, and if any body came in, he talked to her of religion; he often shewed her his privities, and treated her with indecency; deponent was so uneasy that she told Mr. Paul and Mr. Keymer what had passed.

2nd Int.—Respondent is daughter to the promoter, and is a clear-starcher by trade; she is married to one Mason; she wrote many friendly letters to Wheatley; admits writing several letters to him as interrogate, in which she speaks of him as a good man, and a good christian, and says she is a great sinner; the letters were written about Michaelmas, 1753; Wheatley had then secured her affection. 9th Int. A report was raised that Wheatley persuaded her to take physick to destroy a child she was supposed to be big with, and respondent denied that fact. 11th Int. Never declared that Wheatley was innocent with respect to her, but did say the report of her being with child by Wheatley was false. 15th Int. At Wheatley's request she sent a letter to the Dean of Norwich, complaining of his believing false stories of guilt between Wheatley and her. 17th Int. Respondent wrote letters to Mr. Watts from a draft drawn by Wheatley, and brought to her by Keymer, and she sent them to stifle the reports of guilt between her and Wheatley, and called it a malicious ill-grounded report. 18th Int. Respondent wrote a note from his draft to Wheatley, to ask pardon for the false assertion she had made of his guilt. 19th Int. Respondent never made any fond applications to Wheatley; he never gave her good advice but when she was going to receive the sacrament.

ARCHES
COURT.

Easter Term,
May 20

Assizes
Court.

Bristol Term,
May 20.

Timothy Keymer and Thomas Paul swore they talked to Wheatley about his having debauched Mason, and he prevaricated, but confessed he had been guilty of indecencies with her and expressions which they thought amounted to a confession of guilt.

Lydia Bridgham swore that about Michaelmas 1753, Mary Mason expressed great concern to deponent at her correspondence with Wheatley, and deponent heard her charge him with it to his face, and he did not deny it, and deponent expressing sorrow for his behaviour, he replied, "I told Polly it would be ruin to both in soul and body if we went on," and used other expressions admitting guilt.

Francis Bryant swore she came to live with Wheatley as his servant on 30th January 1754, and on that very day he kissed her lewdly, and shewed her his privities, and put his hand up her coats; but deponent resisted him, and afterwards he called her up stairs, and he again attempted to put his hands up her coats, and attempted to lie with her, and said he supposed she was afraid of being got with child, but he * * * * * and then she could not be got with child; deponent would not consent to him, and another day, when he was in bed, he attempted to get her to come to him.

6th Int. Admits she declared she never had spoken slightly of Wheatley. 8th. Int. Says, she told one Olave she was glad she had cleared Wheatley of what was reported against him.

Ann Ebbs swore that there is a door in her wash-house, which goes into Rebecca Payne's bed-chamber, and that on the 22nd August 1753, through a crevice in said door, she saw Wheatley sitting at the feet of Payne's bed, and she lying on the bed by him, and deponent saw him put his hands up her coats.

Peter Wetterick swore that on 22nd August, 1753, Ann Ebbs informed deponent that she had seen Wheatley and Mrs. Payne in very indecent postures together; and deponent being at Ebbs's house on 24th August 1753, through a crevice in Ebbs's wash-house door, which went into Payne's bedchamber, saw Wheatley in said chamber with Mrs. Payne, and saw him put his hand up her coats and he then behaved very lewdly with her.

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COURT.

Easter Term,
May 20.

James Chapman and Sarah his wife swore, that in August 1753, they saw Wheatley and Mrs. Martin go into the arbor in Jermy's garden together; and he there set her upon his knee and put one hand up her coats, so high that they saw her thighs.

Wheatley in his defence examined several witnesses, who swore they believed him to be a virtuous good man; but on interrogatories, admitted they had heard strong reports of his lewdness with Mason and others, and his witnesses proved that both Mason and Bryant had often declared they knew no harm of Wheatley, and that the reports against him were malicious; and he pleaded many letters of Mason's to him in which she highly spoke of his goodness; most of the letters were in a very enthusiastic style, and in several of them there were strong expressions of love and tenderness for him.

N. B. Mason's character was not impeached, except as to her conversation with Wheatley.

On this evidence, the chancellor of Norwich, on the 3rd February 1756, gave sentence against Wheatley, and decreed him to do public penance.

Wheatley appealed to the Arches, where the cause was heard upon the same evidence as before, and I approved the sentence with 50*l.* costs, and remitted the cause.

PREROGATIVE COURT OF CANTERBURY.

4th Session
Easter Term,
May 23.

A next of kin
who had been
cited to see a
will propounded,
having ap-
peared and de-
clared that he
did not oppose
the will, is al-
lowed to be dis-
missed for the
purpose of being
examined as a
witness in the
cause.

ARNOLD *against* EARL and NEWBEE.

Thomas Newbee died a bachelor, having made his will, and appointed George Earl his sole executor ; he left Benjamin Newbee, his uncle of the whole-blood, and William and Richard Arnold, his uncles of the half-blood, his only next of kin. Earl took probate. On first session Hilary Term 1756, William Arnold cited him to prove the will by witnesses ; Earl appeared, and on 8th April 1756, prayed a decree against Benjamin Newbee and Richard Arnold, to see the will propounded, which was personally served on them ; but they did not appear. Earl propounded the will against William Arnold personally, and against the others *in pœnam* ; William Arnold gave in an allegation opposing the will. Earl gave in a plea in reply. Benjamin Newbee was a material witness to prove some part thereof. On first session of Easter Term 1757, Benjamin Newbee appeared, and by special proxy declared he would not oppose the will, and prayed to be dismissed from the cause ; William Arnold opposed his dismissal. The question was, whether under the above circumstances, Newbee ought at his petition to be dismissed from being a party or not. The counsel for Newbee relied on the case of *Beaumont and Sharpe* (a), 14th February

(a) The Delegates present at the decision of this point on 14th Feb. 1752, were — Mr. Justice Denison, Mr. Justice Birch, Drs. Collier, Ducarel and Smalbroke ; the final sentence in the cause was on 31 May 1753, when the Delegates present were — Mr. Justice Denison, Mr. Baron Legge, Drs. Collier, Ducarel, Smalbroke and Clarke.

1752, in the Delegates. The counsel on the other side cited 1 Vernon, 230 (a), and Bacon's Abridgement, 235, the case of *Casey and Beachfield* (b), to shew that in Chancery, though a defendant may, a plaintiff cannot be dismissed to become a witness; and he also cited the cases of *Gilley and Gilley* (c), Delegates, Doctors Commons, 1st July 1738; and *Yardley against South and Wise*, Prerogative, 1744.

PREROGATIVE COURT.
Easter Term,
May 33.

JUDGMENT—SIR GEORGE LEE.

Under the circumstances of this case, I was clearly of opinion that Benjamin Newbee ought to be dismissed; he had not voluntarily made himself a party, but was called in and had not intermeddled at all; that he had now appeared, and declared he would not oppose the will, and therefore had fully answered the purpose for which he

(a) *Phillips v. the Duke of Buckingham* in which it was ruled that a co-plaintiff, though not a trustee, could not be examined as a witness for the other plaintiff in the cause.

(b) The case of *Casey v. Beachfield* is thus reported in Gilbert's Cases in Equity, p. 98. In this case it was said by Mr. Vernon that the reason you cannot examine any of the plaintiffs as witnesses in the cause is, because if the case miscarries the plaintiffs will be liable to costs, and therefore their swearing is to exempt themselves; and it is their own choice that they are made plaintiffs for without their consent they could not have been made so; but the defendants are forced into the cause, and if their being made parties should absolutely invalidate their testimonies it would be in the power of any one who had a mind to oppress another, and deprive him of his defence, to make the most material witnesses defendants in the cause; and therefore any of the defendants to a suit may be examined as a witness, saving just exceptions to their credit, capacity, &c.

The report of this case is to be found almost totidem verbis, in Pre. Cha. 411.

(c) *Gilley v. Gilley*, an appeal from the Exchequer Court at York; sentence was given in the cause on 20th June 1740. The Delegates present being — Mr. Justice Page, Mr. Baron Carter, Drs. Bettsworth, Strahan and Kinaston. The point alluded to was probably argued before the Condelegates at Doctors Commons.

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Easter Term,
May 23.

was cited ;—that to detain him would be a manifest hindrance to justice by depriving Earl of his testimony, for his answers could be of no use, they not being evidence against William Arnold, and no evidence was wanting against himself, as he declared he would not oppose the will, and had thereby judicially bound himself. In the cases where this court had refused to dismiss parties they had materially acted in the cause, and injustice would have been done the adversary by dismissing them ; but in this case, great injustice would be done to Earl by detaining Newbee, who prayed to be dismissed, and I thought had a right so to be : I therefore dismissed him from the cause as a party, and he was immediately produced and sworn a witness.

1st Session
Trinity Term,
June 8.

The claim of a widow to the administration of her husband's effects opposed on the ground of his being a lunatic at the time of the marriage : objection overruled.

PARKER against PARKER and others.

Virgil Parker died 24th May 1753, intestate, without issue. On 23d June 1752, he married Mary Mills, now Parker, who was his servant, by licence at the parish church of Minty in Wiltshire, in presence of above forty persons ; besides the said Mary, who claims as widow, he left Walter and James Parker, his brothers, and Catherine Jenner, his sister. Walter Parker entered caveat, the widow warned it, and prayed citation against James Parker and Catherine Jenner ; they all appeared and denied her interest ; she propounded it ; previous courtship, application to her relations, and declarations to them that he would have her, his applying for a licence, and laying a wager that he would be

married within a fortnight, which wager he won, and the fact of his being publicly married and behaving with the utmost decency at the marriage, and consummation and cohabitation with her as his wife till the 3rd August 1752, when his brothers put him into a madhouse, where he remained to his death, were fully proved. The relations objected that though it was a marriage *de facto*, yet it was not *de jure*, for that he was a lunatic and incapable of consenting to marriage. It did appear that he had a very weak understanding from his infancy, and by hard drinking was at times lunatic, and did many mad and frantic acts, but no commission of lunacy was taken out, nor was he constantly mad, but only by fits; and as it appeared that he married with previous deliberation and intention, went by himself to Minty on the Sunday 21st June, in order to be married the Tuesday following there, where the woman was to meet him at twelve miles distance from his habitation, sent for and paid for a licence himself, declared he was going to be married, and was married by the curate of the parish, who swore that he went through the ceremony with as much propriety as any man could do, and there being no evidence of his doing any mad acts about the time of the marriage, I was of opinion he had a sufficient capacity to contract a legal marriage (a), and pronounced for the widow's interest, but did not give costs.

PREROGATIVE
COURT.

Easter Term,
May 23.

(a) See the same point raised with a different result in *Browning v. Reane*, 2 Phill. 69.

ARCHES COURT OF CANTERBURY.

2d Session
Trinity Term,
June 18.

GOODALL *against* GOODALL.

By Letters of Request from Chancellor of Lichfield.

Plea of adultery
against a hus-
band in bar to a
divorce by rea-
son of the adul-
tery of the wife
not sustained
by proof.

Francis Goodall, a tradesman at Birmingham in Warwickshire, brought a suit for divorce by reason of adultery against Rebecca his wife ; they were married the 20th July 1741, and had three children, of whom a son and daughter are now living. They cohabited together at Birmingham very affectionately till 1744, and then she commenced a criminal conversation with one Mr. Turner, an intimate friend of Mr. Goodall's. In March 1745, she, under pretence of ill usage, left her husband and came to London, and soon after Turner also came to London, and they lived privately in lodgings together as husband and wife, and had several children. In 1751 Mr. Goodall had intelligence that they lived together in Coleman's Buildings. In December 1755 he had a verdict against Turner for 2,500*l.* damages for criminal conversation with his wife. On 4th Session Hilary Term 1756, he gave in his libel in this court, charging her with the above criminal conversation, and that she had eloped with Turner ; she, on the contrary, pleaded that she left her husband on account of his cruel usage of her, and that Turner did not come to town till a month after her. She likewise recriminated, and

pleaded that he was guilty of adultery with different women in the year 1750, and examined three witnesses to prove adultery on him. The adultery was so fully proved upon the wife, that her counsel admitted it, and would not argue that point; and as to the cruelty, it was admitted that there was not sufficient proof of cruelty to justify her leaving her husband, but insisted that there was sufficient proof of his having committed adultery, and therefore that he was not entitled to have a sentence of separation, but that Mrs. Goodall ought to be dismissed. The witnesses to prove adultery against him deposed as follows:

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Trinity Term,
June 13.

1. Rachael Everett, formerly Stanmer, milliner.—Deponent always lived at Birmingham, and followed the trade of a milliner there till 1750; at Christmas 1749, deponent hired a house of Goodall, which had a door that opened into his yard; he frequently came to deponent and attempted to lie with her, and offered deponent forty pounds a-year to be his mistress; in May 1750, deponent consented to let him come into bed to and lie with her, and afterwards he very frequently had carnal knowledge of deponent, but deponent never let him lie with her after Michaelmas 1750, for deponent then broke off her conversation with him, on account of a young man with whom deponent then kept company being very uneasy thereat.

2. Sarah Nash.—Believes producent was forced to leave her husband on account of his cruel usage of her, and that her friends advised her to leave him; deponent knew Rachael Stanmer, alias Everett, and heard her say Goodall offered her 50*l.* a-year to be his mistress; deponent well knew Ann Boweter; about six years ago deponent,

ARCHES
COURT.Trinity Term,
June 18.

at said Ann's desire, went with her to Goodall's house at least six different nights, and said Ann knocked gently at the door, and it was opened, but deponent knows not by whom, and said Ann used to go in, and then deponent went away, and said Ann used to tell deponent she was going to lie with Mr. Goodall, and on the next mornings she has told deponent that she had lain with him those nights.

3d Int. Gives Mr. Goodall a very good character, and says that if she had a daughter she would willingly marry her to him. 9th Int. Never saw him commit adultery with Boweter.

3. Mary Pinkstone.—Deponent knows producent and her husband, and well knows Ann Boweter; Francis Goodall often came to said Ann Boweter's mother's house, and shewed great fondness for said Ann, and deponent has heard the said Ann at nights tell her mother that she was going to Mr. Goodall's; in 1750 deponent was one night at said Ann's mother's house, and said Ann and Mr. Goodall then went together into a parlour where there was a bed and shut the door; deponent looked through the keyhole and saw said Ann unpin her gown, and unlace her stays, and as deponent best remembers, take them off and then she put out the candle.

5th Int. Respondent has lived all her life at Birmingham, has never heard it reported there, that the producent and Turner had criminal conversation together.

N.B. Mr. Goodall's witnesses on interrogatories give him a very good character, say he is a virtuous sober, modest, industrious man, a very tender father, and believe he would have made her a very good husband if she had proved a good wife;

and many of the said witnesses likewise say that Rachael, Everett, and Sarah Nash are persons of most infamous characters, common prostitutes, notorious liars, and persons to whom, in their opinion, no credit ought to be given; but there is no objection in evidence to the character of Mary Pinkstone.

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Trinity Term,
June 18.

JUDGMENT—SIR GEORGE LEE.

Upon consideration of the circumstances of this case, I did not think there was sufficient evidence from the testimony of these witnesses to pronounce that Mrs. Goodhall had made good her plea of re-crimation, and as Mr. Goodall had fully proved her guilty of adultery with Turner, I gave sentence for a separation *à mensa et thoro* by reason of adultery committed by the wife.

PREROGATIVE COURT OF CANTERBURY.

JOHNSON *against* ARMOND.

2d Session
Trinity Term,
June 16.

Time extended
for the return
of a proxy from
Philadelphia.

Susanna Potter, deceased, made her will, and appointed Philip Haste and William Townsend executors, who renounced and gave the residue of her estate to Susanna Johnson, who was her servant. Caveat entered by Mr. Altham, proctor, by order of John Armond in behalf of his son, who was nephew and next of kin to the deceased, and who is resident at Philadelphia. On the 24th March

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Trinity Term,
June 18.

1757, Altham was assigned to exhibit a proxy from John Armond, jun. Johnson therefore prayed that administration *cum testamento* might now be granted to her. John Armond, sen. made affidavit that his son was at Philadelphia, and that on 8th January last he sent a proxy to him to be signed, which was not and could not be returned, and prayed time to the caveat-day in September next to exhibit such proxy, which I decreed accordingly.

June 18.

COOK against COWPER.

An administratrix, cited to exhibit an inventory and account, and to see portions allotted, calls for a proxy from the next of kin; question raised whether the proxy being only signed by the husband of the next of kin, is sufficient.

Henry Cook died intestate, left Mary Cowper his widow, and Susanna, wife of John Cook, his only child. A citation was taken out in the name of Susanna Cook against Mary Cowper to exhibit an inventory and account, and to see portions allotted; she having taken administration to deceased: Cowper appeared and prayed that Cook's proctor might exhibit a proxy, which he was assigned to do; Susanna Cook lives separate from her husband, he having commenced a suit against her, which is now depending in the Consistory Court of London, for a divorce for adultery, the proctor therefore exhibited a proxy from the husband only; the counsel for Cowper insisted that the proxy was not sufficient, that the wife was the proper party, and that by statute 1 Jac. 2. chap. 17. sect. 6. (a) no person could be cited to an

(a) "Provided always, and it is hereby further enacted, that no administrator shall from the four and twentieth day of July

account but at the instance of the next of kin, or a creditor &c., and that the husband did not come under those descriptions, and could not commence this suit but in the name of his wife, and therefore that Cowper ought to be dismissed. On the contrary it was said that the real interest vested in the husband, which the wife could not by her refusal to join with him, deprive him of;—that the citation might have been in name of husband and wife, and if she had carried on the suit he ought to have joined in the proxy. Delegates, *Von Thienen's* case, administration granted to the husband in right of his wife, when she, who lived separate from him, refused to take it, in order to prejudice her husband.

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COURT.

Trinity Term,
June 12.

JUDGMENT—SIR GEORGE LEE.

As there was no evidence in this case that the wife had been applied to and had refused to sign the proxy, in order to justify the Court in departing from the common course of proceeding, I directed that she should be applied to, to sign the proxy, and if she refused, upon affidavit made of the fact, I should have no difficulty in accepting the proxy from the husband only, and allowing him to proceed alone in the suit, as the real interest was vested in him as husband; for otherwise there would be a failure of justice, and the hus-

next be cited to any of the Courts in the said last act mentioned, to render an account of the personal estate of his intestate, (otherwise than by an inventory or inventories thereof) unless it be at the instance or prosecution of some person or persons in behalf of a minor, or having a demand out of such personal estate as a creditor or next of kin; nor be compellable to account before any of the ordinaries or judges by the said last act empowered or appointed to take the same, otherwise than as aforesaid; any thing in the said last act contained to the contrary notwithstanding." 1 Jac. 2. c. 17. s. 6.

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June 13.

band's right would be dependant on the pleasure of the wife. Delegates, 22nd May 1732, *Lopes Da Rosa and others against Lusitano De Pinna and Others*, De Pinna prayed administration to her mother and sister, was opposed by Da Rosa, another sister, who lived at the Brazils. The Judge of the Prerogative decreed administration to pass under seal to De Pinna, who was sworn administratrix. Da Rosa's proctor appealed, and in the Delegates Mrs. De Pinna gave a proxy to renounce her right to the administration, in order to prejudice her husband, the husband intervened, and prayed that her proxy might be rejected. The Court was of opinion, that on decreeing the administration to the wife, an interest was vested in her husband which she could not by any subsequent act deprive him of, and therefore rejected her proxy of renunciation. Vide my second Case Book, p. 180. (a)

(a) The valuable note referred to is as follows :

DELEGATES, (Doctor's Commons) May 22, 1732, 4th Sessione
Paschee.

Lopes da Rosa et al' versus Lusilano de Pinna et al'.

Judges—Drs. Pinfold, Strahan, Audley and Isham.

Mary Agnes de Pinna, in the Prerogative, prayed administration to her mother and brother ; she was opposed by Lopes da Rosa and another sister, both which lived at Bahia in the Brazils. Administration was decreed to Mary de Pinna, who was a feme covert, she was sworn administratrix, and the administration decreed under seal ; Mr. Lanes, proctor for Lopez da Ross &c., appealed, and now in the Delegates Mr. Holnar appeared for De Pinna, the husband, and would have appeared for Mary de Pinna the wife also, but she having altered her mind, gave a special proxy to Mr. Cheslyn to renounce her right to the said administration, and give an affirmative issue to the libel of appeal.

The question was, whether this proxy could now be admitted ; it was insisted that it could not, for the administration having been decreed, there was a *jus acquisitum* to the husband, and the

PREROGATIVE
COURT.3rd Session,
Trinity Term,
June 21.LADY VISCOUNTESS MAYO *against* BROWN.

Gertrude Aylmer, alias Brown, died 28th December 1729, intestate; left Stephen Brown, Esq. her reputed husband, and Catherine Aylmer, now Lady Mayo, her reputed lawful daughter by Whitgift Aylmer, Esq. her first husband; deceased died at Bordeaux in France, but left considerable effects in Jamaica. Lord Mayo took administration to deceased at Jamaica (it being the course there to grant it to the husband,) in right of his wife, as deceased's lawful daughter. Brown likewise took administration to deceased as his lawful wife here in the Prerogative Court, in October 1732. After long litigation in Chancery between Brown and Lady Mayo concerning her father and mother's estate, she alleged in the Prerogative Court that Brown was not lawful husband of Gertrude, the deceased, and took out citation against him to bring in his administration and shew cause why it should not be revoked and administration granted to her, as daughter to deceased. Brown appeared and denied Lady Mayo to be deceased's legiti-

Legitimacy so far presump-
tively establish-
ed as to throw
on the opposing
party the bur-
then of dis-
proving it.

wife could not now renounce in prejudice to her husband; and to shew that a wife who has the interest immediately in her, shall not by her act prejudice her husband, Dr. Andrew cited the cases of *Jacobs v. Flutter* in the Arches 1719, of *Lilley v. Bevoir* Prerog. 1719, and also of *Gibbs v. Davis*, and of *Silvester v. Gee*, both in the Prerogative.

In the present case the Court was of opinion the wife could not renounce and give an affirmative issue in opposition to her husband, and therefore would not admit her proxy for that purpose.—*MSS. Note Books of Sir George Lee.*

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June 21.

mate daughter. She propounded her interest, and alleged that Gertrude Brown many years since married Whitgift Aylmer, and had issue of that marriage Catherine, now Lady Mayo, the party, but did not fix the factum of their marriage, nor the year in which it took place, nor the year in which she herself was born, but pleaded her father's will, dated 13th June 1719, in which he gives the residue of his estate to Catherine Aylmer, his only daughter, and appoints her mother guardian, and his codicil dated in August 1720, when he again mentions her as his daughter, a deed dated 16th November 1720, wherein Gertrude, the deceased, after she became a widow, made a settlement on her daughter Catherine; and also pleaded letters and other papers signed by Brown, wherein he had mentioned Lady Mayo as legitimate, and called her his daughter-in-law. Lady Mayo in her minority married Mark Hamilton, in the warrant for the licence she was described as the lawful and natural daughter of Gertrude Brown, formerly Aylmer, and her mother signed and swore to that warrant, and Mr. Brown joined in the bond on obtaining the licence. Lady Mayo further proved by witnesses that Whitgift and Gertrude Aylmer had constantly and uninterruptedly owned her from 1714 to their respective deaths as their lawful child, and that she had always been reputed legitimate; this was the substance of her evidence. On the other hand Brown admitted that Whitgift and Gertrude were lawful husband and wife, but alleged that Lady Mayo was born in 1711, and that her father and mother were not married together till 1712. The only proof he attempted to make of these facts was as follows; One witness swore that in 1711, 1712,

and 1713 Gertrude lived with Whitgift, as his servant and owned herself to be so; and another witness swore that he dined with Whitgift the beginning of 1712, when Gertrude sitting at the head of Whitgift's table, he took her for his wife but Whitgift told him she was a lady he had a great regard for, but that she was not his wife, and that he had no wife; other witnesses swore that her mother always declared her to be of such an age as would bring her birth to the year 1711, particularly in the marriage licence in 1727, she was described as upwards of sixteen; but most of his witnesses said they always esteemed her to be legitimate, and there was no sort of proof that Gertrude was reputed to be Whitgift's mistress, or any imputation whatever upon her character, save what arose from the supposition that this daughter was born before marriage. He further pleaded an answer of Lady Mayo in Chancery, in which she said she was nine years old in 1720, when her father died; he likewise pleaded an entry on a loose piece of paper of the birth of Catherine, said to be written by her mother and to be found in her trunk by Brown after her death; the only proof of this paper was by a maid-servant, who had lived with Gertrude only three months, who swore she believed it to be her handwriting but no proof of the finding it or of its ever having been shewn to any body by Brown, or spoken of. This entry said that Catherine was born on 13th August 1711; but there was good reason to suspect this paper, and there was not a syllable of proof that Whitgift and Gertrude were married in 1712 and not before, and consequently, if it had been clearly proved that Lady Mayo was born in 1711, it would not have followed that she was illegitimate; and therefore, upon the admission

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that her father and mother were lawfully married together, and the full proof that they constantly owned her for their legitimate child, and from the general reputation of her legitimacy from her infancy to the commencement of this cause, I pronounced for Lady Mayo's interest, notwithstanding there was no actual proof of the marriage of her father and mother, or of the time of her birth, and condemned Brown in costs. His proctor appealed *ad statim*.

N. B. I was of opinion that the full proof Lady Mayo had made of her being reputed to be legitimate, and of the constantowning of her as such by her father and mother, threw the proof on Brown that she was not legitimate, and obliged him to shew she was born before her parents' marriage, by shewing the precise time of her birth, and of their marriage subsequent to it.

4th Session
Trinity Term,
June 30.

STOTE *against* THOMAS TYNDALL, Esq. the King's Proctor.

(Upon Admission of an Allegation.)

If a person dies intestate, and without leaving any sort of relations in blood, administration is granted to the nominees of the crown, but the most remote relation defeats the king's title.

Dr. Simpson for Stote.—The Honorable Dorothy Windsor, widow, died in January 1757, aged 84, intestate; left Richard Stote, Esq. her cousin and next of kin; he applied as such for administration, and was sworn administrator; but the King's proctor entered caveat and denied our interest. The deceased was daughter of Sir Richard Stote, of Stote Hale in Northumberland, serjeant at law,

who left a son, Bertram, and three daughters, ^{PREROGATIVE COURT.} Margaret, Frances, and Dorothy, the deceased in this cause. Bertram died a bachelor at Newcastle in 1707, Margaret married the Rev. Mr. Tonge, and Frances married Mr. Shipper, and both died many years ago without issue. Dorothy married the honourable Dixey Windsor, Esq. and she also died without issue ; she lived, for many years before and to her death, in and about London. Richard Stote, the party, is son of Robert and Ann Stote, of Northumberland ; Robert died in 1705, but in his life-time was very intimate with Bertram Stote and his sisters, and they always owned him as their cousin and nearest relation. We have not set forth a common ancestor in our allegation, nor have pleaded in what degree of cousin we stood related to deceased, but rest our case in this plea solely upon mutual ownings ; for against the crown we have nothing to do but to shew a general relationship, because the crown has no colour of interest if the deceased left any relation, however remote ; and indeed the crown has not a legal interest to claim the personal estate even if the deceased had left no relation, for then the personal estate would be in the ordinary ; for before statute 13 Edw. 1. c. 19. (a) the ordinary took the personal estate to dispose of it to pious uses, and that statute only subjected it to the deceased's creditors. 31 Edw. 3. chap. 11. directs administration to be granted to the next friend to deceased. 21 H. 8. ch. 5. gives administration to the widow or next of kin to deceased ; but if there is no widow or next of kin, the statute of distribution, 22 & 23 Car. 2. ch. 10. cannot take place, and then the personal estate remains in the ordi-

Trinity Term,
June 30.

(a) Vide 1 Phill. p. 12. *notes.*

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nary, as it did before any of those statutes. Judges of late have chosen to grant administration to a nominee of the crown, rather than keep the personal estate in their own hands, to subject themselves to actions. No office has been found, nor can be of personal estate, to vest a right in the crown. Where a dispute has been between a nominee of the crown and a creditor, (neither of which has a legal title to administration) it has been granted to the king's nominee, as being generally the more worthy and responsible person. The nomination by the crown is only a recommendation. *Salk. 37. Manning and Knapp*, A. B. nominee of the crown prayed administration, C. entered caveat and gave him a vexatious opposition, for which A. B. brought an action for damages against C. Lord C. J. Holt held, the action would not lie, for the granting of administration to the nominee of the crown was rather a matter of favour than of right.

Dr. Hay, for the crown, opposed the allegation, as being so general that it set forth no relationship or pedigree at all, and therefore concluded nothing.

JUDGMENT—SIR GEORGE LEE.

I mentioned the case of *Sir Thomas Colby* in the Prerogative, who was supposed to have been a bastard, and consequently as he died a bachelor, could have no relations: there the crown interposed, but it appeared that he was legitimate and had relations; and I took it now to be a settled point, that if a man died without having any sort of relations in blood, administration should be granted to the king's nominee; but as the most

remote relation would defeat the king's title, I was of opinion this allegation ought to be admitted as against the king's nominee, though it did not set forth any pedigree, but rested only on mutual ownings and general reputation of relationship.

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N. B. Mr. Stote not having pleaded a pedigree, but having rested his title upon reputation and owning of a relationship between his family and the deceased's, I, on the 1st session Trinity Term, 24th May 1758, admitted an allegation on behalf of the crown, pleading in contradiction that the deceased's and the claimant's families never did visit, or own each other as relations, and also pleading that both the deceased and the claimant had declared they knew of no relationship between them.

MARTIN *against* ROLINSON.

June 30.

Dr. Bettesworth for Rolinson.—John Peterson, alias Pitts, mariner in the St. George Indiaman, made his will 5th September 1747, and appointed Mary and Erasmus Rolinson his executors; it is said he made another will dated 10th January 1749, and appointed Swain Martin sole executor. In June 1751, Mary Rolinson, with consent of Martin, proved the first will, and with his privity and in his presence received deceased's wages, viz. twenty-four pounds, at the India House; and first deducting what deceased owed her, paid the surplus to Martin and took his receipt for the same; afterwards he cited her to bring in her

A cause delayed
till the return of
a material wit-
ness from be-
yond seas.

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probate, &c. and shew cause why probate should not be granted to him of the latter will. Cheslyn, his proctor, propounded the last will ; in February 1756, we pleaded the above facts ; on 12th May 1756, Cheslyn was assigned to give answers to our plea, which assignation was continued from court-day to court-day to the 1st March 1757. On the 4th May 1757, Smith, her proctor, was assigned to prove. Herbert Hanson who attested the receipt, and is a very material witness for us, is gone on a voyage to North America, of which fact we have an affidavit, and therefore pray the term probatory may be continued till he returns home.

Affidavit read.

JUDGMENT — SIR GEORGE LEE.

I said it was a common case in the Admiralty Court to delay a cause till a material witness came home, and had often been done in this court,—that the delay in this cause had arisen from Cheslyn's client, who had not given in his answers till last term,—and as this was a trifling cause, carried on only with respect to costs, which originally could be but very little, but would become large by this suit, I would give time, if there was no other reason for it but to allow opportunity to the parties to agree ; I therefore continued Smith's term probatory to the 1st session of next Michaelmas Term.

PREROGATIVE COURT.

Trinity Term,
June 30.ROBERTS *against* ROBERTS.

Dr. Bettesworth for Thomas Roberts.—Thomas Roberts, uncle to my client, died 13th March 1755; by his will he gave to my client a legacy of 100*l.* to be paid when he arrived at the age of 25 years; all the residue of his estates he bequeathed to William Johnson and William Newell, or the survivor of them and the executors or administrators of such survivors, upon trust to sell his effects and lay out the money on securities and pay the interest to his daughter, Sarah Roberts, in case she married with consent of her trustees, and her receipts, notwithstanding her coverture, to be a sufficient discharge, and in case she should die leaving a husband, then to pay the interest to the husband and her children by him in such shares as the surviving trustee shall think fit, and after such husband's death to pay the interest for maintenance of the children, and the principal to be paid them share and share alike at their respective ages of 21 years; but in case his daughter should marry with consent and have children who should die minors without issue, then the said trustees or the survivor of them to pay one moiety of the residue to Catherine Roberts, his the testator's sister, and the other moiety to his nephew Thomas Roberts; and he made Johnson and Newell executors, who have renounced probate as executors and administration *cum testamento* as residuary trustees. Sarah Roberts, the daughter and residuary legatee for life, being under 21 years of age, chose the said William Johnson for her guardian

A contingent interest in the residue, entitles a party to call for an inventory and to have notice of the securities.

In the case of minors the Court orders an inventory *ex officio*.

PREROGATIVE
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Trinity Term,
June 80.

in June 1755, and he then took administration *cum testamento* as guardian for her use till she should arrive at the age of 21. On the 22nd February 1757, caveat was entered for Thomas Roberts, who is arrived at the age of 22. Sarah soon after came of age, and the administration to Johnson expired; the said caveat was warned for 24th March 1757. Cheslyn appeared for Sarah Roberts, who is now married, and prayed administration *cum testamento*. Fanshaw appeared for Thomas Roberts and prayed an inventory or commission of appraisement, and notice of the security, before administration should be granted to the daughter. Cheslyn confessed Thomas to be a nephew to the deceased and a legatee in his will, and also one of the substituted residuary legatees, and offered to bring the legacy of 100*l.* into court to be lodged in the name of the register and the said Thomas, in the funds, till said Thomas should arrive at the age of 25 years and be capable of receiving it, but denied he had any interest to pray an inventory or commission of appraisement and notice of the security, before administration should pass the seal. The question is, whether he has sufficient interest for the purposes aforesaid.

JUDGMENT—SIR GEORGE LEE.

I was of opinion his interest in the residue, though it was contingent, was sufficient to entitle him to an inventory and to notice of the security; as the estate was now come into the hands of the daughter (contrary to the intention of the testator) who had only an interest in it for life, the Court of Chancery would decree a full discovery, and would oblige her to give security, and this Court has usually ordered inventories

er officio in the case of minors ; I therefore ordered an inventory and notice of the sureties for the benefit of those who might have interest in the estate after the daughter, but refused a commission of appraisement.

PREROGATIVE COURT.

Trinity Term,
June 30.

PICKERING and TOWERS against TOWERS.

By-Day after
Trinity Term,
July 6.

Dr. Hay for William Pickering and James Towers.—Samuel Towers, Esq. deceased, made his will wrote with his own hand, dated 16th September 1752, attested by three witnesses ; gave his estate at Paddington to his son James, and his estate at the Seven Dials to his sons-in-law William and John Pickering who married his daughters, and 3000*l.* to each of them ; to his eldest son George 2000*l.*, and 3000*l.* to his children, and to his daughter, William Pickering's wife, 1000*l.* ; and left divers other legacies to his children, grandchildren, and friends, some of which were given over in case the legatees died without issue and minors ; left George and James Towers his sons, and Elizabeth the wife of William Pickering his daughter, and grandchildren by his daughter Mary, deceased, who was the wife of John Pickering ; he did not bequeath the residue or expressly name executors, but we say he made William Pickering, James Towers, and John Pickering executors by the tenor of the will in these words : “ *I appoint William Pickering, James Towers, and John Pickering to*

Executors appointed according to the tenor of a will.
Whoever gives a power must be presumed to intend to give every thing to make that power complete.

PREROGATIVE
COURT.

By-Day after
Trinity Term,
July 6.

receive and pay the contents abovementioned." He says nothing of his debts, &c., but his will contains only devises of real and personal legacies, which he directs shall be paid within two months after his death. John Pickering is dead, but made his will and appointed his said brother William Pickering testamentary guardian of his children; many testamentary papers were brought into court upon affidavits of scripts and scrolls, in some of which William Pickering and James Towers were named executors; George Towers, the eldest son, prays that administration *cum testamento* may be granted to him solely, or to him, William Pickering, and James Towers jointly. We pray probate to William Pickering and James Towers; but if the court should be of opinion they are not constituted executors by the tenor of the will, then we pray that administration *cum testamento* may be granted to James Towers and Elizabeth the wife of William Pickering, to which William, as guardian to John's children (who are entitled to distribution of the undivided residue), consents, and who therefore have three interests against one. The first question is, whether William Pickering and James Towers are not executors by the tenor of the will under the words abovementioned? Testator says nothing of paying his debts, but they must receive the whole and pay the debts before they can pay the legacies. Godolph. Orp. Leg. part 2. c. 5. p. 82. n. 3. Although no executor, by the word executor, is expressly in the will nominated or appointed, yet if any other words or circumlocutions equivalent to the function of an executor, or to the charge and office which *in any part* pertains to an executor, be recommended or committed to

any one or more, it shall amount to as much as PREROGATIVE COURT. the ordaining or constituting him or them executors by the very word executor.

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July 6.

Dr. Bettesworth same side.—They must collect in the effects to pay the legacies which is the act of an executor. The words of appointment which are in question are the last words of the will, and added after the date, and must be presumed to have been inserted by the testator upon reading over the will and finding he had omitted to appoint any person to administer his estate.

Dr. Simpson for *George Towers*.—We have offered immediate distribution and undoubted security. The legacies to the children are given over if they die minors, and therefore the appointment was only intended to secure the legacies in trust. The same persons ought not to be administrators and trustees; administrators are more favourable than executors in consideration of law, because the first give security. *George* is the eldest son, and his legacy is not contingent as the others are, but is absolute and therefore he has a more beneficial interest than they.

Dr. Smallbroke same side.—The words of the appointment create a trust for a special purpose, not a general executorship. The undevised residue amounts to 10,000*l.* and no power is given to them over that.

JUDGMENT — SIR GEORGE LEE.

I was of opinion that *William Pickering* and *James Towers*, under the words above stated, were executors according to the tenor of the will; for

**PREROGATIVE
Court.**

**By Day after
Trinity Term,
July 6.**

they could not receive and pay the legacies without collecting in the effects. No one can assent to a legacy but he that has the management of the estate, because legacies cannot be paid till after the debts, and he only who has the management of the estate knows whether the assets are sufficient. If the legatees were to sue in the Arches for their legacies they must sue the testator's representative, and I must decree him to pay the legacy to the legatee, which would totally defeat the supposed trust. Whoever gives a power must be presumed to intend to give everything necessary to make that power effectual; but upon supposition that these gentlemen are only trustees, they can do nothing pursuant to any power conveyed to them by the will till they have had a decree in Chancery against the representative of the testator to pay the several legacies to them; now it cannot be supposed that any testator in his senses would impose a burthen-some trust upon his friends, and at the same time intend they should first go through a Chancery suit to put them in a condition to execute that trust: to avoid such an absurdity, I must suppose he intended by the words abovementioned to give them the general management of his personal estate, and therefore I decreed probate to William Pickering and James Towers, as executors, according to the tenor of the will; and if I had not thought the words sufficient to amount to a constitution of executors, I should have granted the administration *cum testamento* to James Towers and Elizabeth Pickering, not only because they had a majority of interests, but also because that would the most effectually have carried the intention of the testator into execution.

PREGATIVE
COURT.

**STOTE against THOMAS TYNDALL, Esq. the
King's Proctor.**

Cavent Day
after
Trinity Term,
July 28.

Mrs. Windsor died intestate, leaving no near relations ; the crown insisting she left no relations at all, claimed her estate. Mr. Stote appeared, and alleged he was her cousin, and prayed administration ; Mr. Tyndall denied his interest ; he gave an allegation pleading ownings between his family and deceased's of relationship, but set forth no common ancestor. I admitted the allegation for reasons stated before, and now this day Stote prayed a commission of inspection and appraisement, which Tyndall opposed.

In an interest cause, a party who has given in an admissible allegation has a right to a constat of the effects.

A commission of appraisement decreed in preference to an inventory.

JUDGMENT—SIR GEORGE LEE.

I was of opinion, as his allegation was admitted, Stote had a right to a constat of the estate ; that it would be for the benefit of whoever should hereafter have a title to the estate ; that I could not decree an inventory, because the king's proctor not being in possession of the effects could not give one, but a commission of appraisement might be executed whoever was possessed of the effects ; and therefore I decreed a commission of appraisement to be executed in the common course, but did not decree a particular commission of inspection.

PREROGATIVE
COURT.Caveat Day,
July 28.MACHIN and TYNDALL *against* GRINDON
and Others.

Where a person declares that a will has not been executed according to his intentions, no part of the will can be entitled to probate.

The Court will not establish a testamentary paper not found in the custody of the deceased, or supported by extrinsic evidence, upon controverted evidence of hand-writing.

John Pickering died suddenly on the 7th August 1755, made a will dated 17th December 1754, appointed Ann Machin, Thomas Tyndall, and —— Emily, executors, left a legacy of ten pounds to John Grindon; the will is not controverted, it is duly executed and witnessed, but deceased having an intention to alter his will, sent for Emily, one of his executors, and desired him to draw a codicil; one was drawn and carried to deceased, he read it, disapproved several clauses in it, said it was not agreeable to his instructions, and declared then and the next day that he would not sign it, but as he was going to St. Alban's he would carry that and his will with him, and would have it altered when he came back; but he never did any thing towards finishing it: in this codicil he gave a legacy of ninety pounds to John Grindon in addition to the ten pounds left him by the will; this unexecuted paper John Grindon propounded, and also another paper in these words:

“July 23, 1755—Over and above the money I shall lend Mrs. Cole that I have given my kinsman John Grindon, I do hereby give him six hundred pounds now in the hands of my lawyer; I intend to make it a thousand to put out at Noman's Land.

“JOHN PICKERING.”

On 25th June 1755, deceased went to St. Alban's, and lodged at Grindon's house, where he staid till 29th July following, and carried with him his will and the draft of the codicil, dated 24th June 1755, which he brought back with him.

Grindon pleaded that he found the codicil dated 23rd July 1755 in a drawer in the well of a bureau which stood in the room in his house, wherein deceased lay while he lodged with him at St. Alban's, the key of which bureau deceased delivered to him when he went to London on 29th July; that he found it in said bureau on 28th August 1755, when he was alone, and that the whole body thereof and the signing was deceased's hand-writing; he further pleaded that deceased had great affection for him, and had declared about that time that he would do well for him. As to the finding, no proof thereof was attempted, but there was some evidence that the deceased had a regard for him. One William Smith swore that in discourse with deceased on the 17th July 1755, he said to deceased, "I hope you will do something for Mr. Grindon;" deceased replied, "I have done something, and will do more, for I am fitting up a room in his house and intend to come here when I have settled my affairs;" and Joseph Hanley swore that on 24th July 1755, deceased said to him, "I have done something for John Grindon, and if he behaves well I will do more for him, I am going to London and shall alter my will, there is something in it that is not quite to my liking, it will be to his advantage I assure you." To prove deceased's hand-writing he exhibited several letters and receipts, which were allowed to have been wrote by him, and examined four witnesses: George Richards, who believed the whole was wrote by deceased, but confessed he had never seen him write any thing but his name; Thomas Rogers also believed it was wholly wrote by deceased, but said that he had

PREROGATIVE
COURT.

Caveat Day.
July 28.

**PATROGATIVE
COURT.**

**Careat Day,
July 26.**

once seen deceased write a receipt, and he was acquainted in some manner with deceased's hand-writing; Maximilian Grindon, brother to the party, said he was well acquainted with deceased's hand-writing, and believed the whole codicil was wrote by him; and Phineas Coates, the fourth witness, who was a relation of the deceased's, said he was very well acquainted with deceased's manner of writing, and did verily believe it was not wrote by deceased, gave several reasons for his believing it was not, both with respect to the turn of the letters and the false spellings and mistakes. On the contrary, the same Coates was examined by the executors, who deposed the same upon his second examination, and was supported by another witness, who said he was well acquainted with deceased's manner of writing, and verily believed this codicil was not wrote by him.

N. B. It appeared in evidence that Grindon, soon after deceased's death, wrote to his brother to send him all the letters he had from deceased, and to get as many from other people as he could, and that his brother accordingly sent him several, which were exhibited, and there was a great similitude between those letters and the codicil pronounced.

JUDGMENT—SIR GEORGE LEE.

Upon this evidence I pronounced against both the codicils; against the first, dated 24th June 1755, because the deceased had expressly declared it was not agreeable to his mind, and had expressly said he would not execute it; and I was clearly of opinion I could not in this case pro-

bounce for part of the legacies contained in it (as the counsel argued I might), and reject those clauses which the witness said deceased objected to; for as he declared it was not drawn agreeable to his instructions, and that he would never sign it, there might be other parts he disliked besides those he particularly mentioned.

PREROGATIVE
COURT.

Caveat Day,
July 28.

Against the second codicil, dated 23rd July 1755, because it was not supported by any circumstance whatever; on the contrary the circumstances gave suspicion of forgery: his declarations that he would do well for Grindon referred to a future settlement he intended to make of his affairs when he came to town, particularly the declaration deposed to by Hanley on 24th July, the day after the date of this paper, could not possibly refer to it, but on the contrary referred to a future act to be done by him, which shews he knew nothing of this paper; he left his lodgings at Grindon's on 29th July without intention of returning thither again, he carried his things away with him, and particularly his will and the other codicil. Now it is incredible that he should leave this paper behind him in a bureau, the key of which he gave up to Grindon; and if deceased had wrote it he could not have forgot it, because it bears date but six days before he left Grindon's. Grindon's solicitude to get as many papers of the deceased's hand-writing into his custody as he could presently after the deceased's death, gives a degree of suspicion, and also his saying nothing of it at the time, it is pretended, he first found it; but supposing there were no suspicions at all of any indirect practice, I was of opinion there was not evidence enough before the court to establish this

**PREROGATIVE
Court.**
Caveat Day,
July 28.

paper, for it stood solely upon a doubtful proof of handwriting, the most uncertain species of proof. The court had never established a paper not found in the deceased person's custody, nor supported by any circumstance, upon a controverted evidence of handwriting; and in this case the evidence that it was not Mr. Pickering's handwriting is as strong as the evidence that it was: I therefore decreed probate to the executors of the will alone, but did not give costs.

September 8.

WORTLEY against MACKENZIE.

**The will of a
lunatic not
brought for-
ward for pro-
bate.**

Elizabeth Morgan, deceased, made her will 30th April 1734, appointed Bartholomew Wortley, clerk, her executor and residuary legatee; on 13th December 1734 she made a codicil, gave divers legacies therein to Caius College in Cambridge. In 1742 she lost her memory and became insane, and was put under the care and direction of Mr. Thomas Ewens of Cambridge, who procured her to sign a will. On 4th November 1742 George Mackenzie and his wife, who was the deceased's niece and next of kin, took out a commission of lunacy against her, and in December 1742 the Inquisition found her a lunatic for eleven months preceding, which extended beyond the time of the date of Ewen's will, and therefore the Lord Chancellor ordered that will to be lodged in the hands of Master Edwards. Deceased died in the end of 1748; caveats were entered by Wortley the executor, and Mackenzie the niece; affidavits of scripts

given in by both parties. Mackenzie annexed to her affidavit the will of 30th April 1734, and Wortley annexed to his affidavit the codicil of 13th December 1734. Nothing farther was done. Wortley, executor of Morgan, made his will and died, having appointed Sir Thomas Gooch Bishop of Ely, and Dr. Barber his executors, and also made a codicil, whereby he gave the residue of his effects to the master and fellows of Caius College. His executors proved his will and codicil, and the Bishop is since dead; the College has now appointed a syndick with power to pray that administration with Morgan's will and codicil, made in 1734, may be granted to Dr. Barber as surviving executor of Wortley, or if he refuses to accept it, that it may be granted to their syndick, who now prayed, and I decreed accordingly, citations against Mrs. Mackenzie as niece and next of kin to Mrs. Morgan, and against Dr. Barber as surviving executor of Wortley, to accept or refuse administration *cum testamento* to Morgan, and also against Sir Robert Ladbrooke, who is executor of Thomas Ewens, to bring in and prove if he thinks proper the last will obtained by said Ewens, who is since dead.

PREROGATIVE
COURT.

Caveat Day,
September 8.

SNAPE against WEBB and Others.

September 8.

The Hon. William Montague, Esq. deceased, made a will and appointed executors in trust for his wife; they renounced, as did also the wife and the principal specific legatee. James Snape, the deceased's

Administration
cum testamento
annexed con-
tested by a
creditor and
by a person
who had been
joint assignee

with the deceased in a bankrupt estate, granted to the creditors.

PREROGATIVE
COURT.Caveat Day,
September 8.

gentleman, prayed administration *cum testamento* as a creditor, and made oath that the deceased was indebted to him the sum of 151*l.* 12*s.* 8*½d.* for wages, board-wages, and money laid out for his use. Several other creditors were before the Court, who did not oppose Snape's having the administration, he agreeing to sign articles to pay *pro rata*, and Mr. Triggs, a creditor by bond in 200*l.* consented by his proctor that Snape should have the administration, but no proxy for that purpose was exhibited. George Williams, Esq. appeared by his proctor, and alleged that he was a joint assignee with deceased of the estate of Thomas Landy, a bankrupt, and that deceased had received five hundred pounds of Landy's effects, which he had applied to his own use, and had not accounted with him or any of Landy's creditors for the same, of which Williams made affidavit, and prayed administration *cum testamento* to deceased as a creditor upon the footing above stated.

JUDGMENT — SIR GEORGE LEE.

But I was of opinion that Williams, as a joint assignee with deceased, was only a trustee for Landy's creditors, and would have his remedy against the deceased's Representative in equity, but was not a creditor himself to the deceased's estate, and therefore since no creditor of a superior nature to Snape appeared to pray the administration *cum testamento*, I decreed it to him, giving security in 1,200*l.* (which was agreed to be double the value of deceased's effects) by sureties residing in England, and give notice of those securities to the other parties, and a bond to pay *pro rata* as he had offered to do.

PREROGATIVE COURT.

Caveat Day,
October 6.

The expenses of a commission of appraisement, decreed to be paid out of the estate of a testator.

PICKERING and TOWERS *against* TOWERS.

Samuel Towers, Esq. made his will, and William Pickering, who married his daughter, and James Towers, his younger son, executors, according to the tenor of his will, and gave his eldest son George Towers a legacy of two thousand pounds, but did not bequeath the residue. George Towers prayed a commission of appraisement, which the executors did not oppose, but joined in the commission. They afterwards paid George his legacy, and now George prayed that the expences of the commission of appraisement might be decreed to be paid out of the estate; the executors opposed it, insisted that George having received his legacy, had no interest in the estate, for that the undevised residue vested in the executors notwithstanding they had legacies, because they were near relations to deceased, and that an appraisement was unnecessary, most of the personal estate being in the funds.

JUDGMENT—SIR GEORGE LEE.

The question concerning the distribution of the residue not being before me, I said I would give no opinion upon that, further than that George had a semblance of an interest with respect to the residue, that at the time the commission was decreed he had an interest as a specific legatee, the effect of which could not be taken away after the expences of the commission had accrued, and as the executors had not objected to granting a commission, but had joined in it, I was clearly of opinion the expences thereof ought to go out of the estate, I decreed accordingly.

PREROGATIVE
COURT.Caveat Day,
6th October.

Where an executor renounces it is the practice to grant administration *cum testamento annulo* to the residuary legatee in preference to the executor; but the court cannot refuse an administration of this description to a person who is both of next of kin and residuary legatee.

LINTHWAITE *against* GALLOWAY.

John Cook made his will, appointed executors who renounced, left legacies to his wife, and real estate to any child or children he should have, bequeathed the residue to his wife's sister, Mrs. Linthwaite, and to his own sister, Mrs. Galloway; deceased left no issue, and his wife died after him, but without taking administration. Mrs. Linthwaite prayed administration *cum testamento* to be granted to her solely. Mrs. Galloway prayed that it might be granted to them two jointly, as being joint residuary legatees.

JUDGMENT—SIR GEORGE LEE.

I was of opinion I could not in this case refuse to grant administration to Mrs. Galloway. By statute 21 Hen. 8. c. 5. when executors renounce, administration *cum testamento* is to be granted to the widow or next of kin, though by constant practice ever since that statute, administration *cum testamento* has been granted to the residuary legatee preferably to the next of kin, because the next of kin was deprived of all real interest in that case by the will, and such practice was confirmed by statute 22 & 23 Car. 2. c. 10., but when the same person is both next of kin and residuary legatee, neither law nor practice would warrant a refusal to grant administration *cum testamento* to such person; I therefore granted it to Linthwaite and Galloway as joint residuary legatees.

PREROGATIVE COURT.

SMITH *against* SMITHSON.

Frances Smithson, deceased, made her will 1st January 1857, and appointed John Smith executor. Richard Smithson, her nephew and next of kin, and also executor of a former will dated 20th January 1754, entered caveat. Both parties propounded their respective wills as executors of the deceased Frances Smithson. Smith examined two witnesses who (as suggested) had fully proved capacity, execution, &c., but the proof of the identity of the testatrix was deficient, and therefore, when the cause stood *ex 2do*, Dr. Simpson, for Smith, moved that the court would rescind the conclusion, and allow them to plead the identity, which was opposed by Dr. Smalbroke on behalf of Smithson; but I rescinded the conclusion, and admitted an allegation pleading the identity of the testatrix, and condemned Smith to pay 1*l.* 6*s.* 8*d.* *pro expensis retardati processus.*

1st Session
Michaelmas
Term,
November 7.
The conclusion
of a clause re-
scinded to allow
the party to
plead the iden-
tity of the test-
atrix on the
party praying
for the indul-
gence paying
the expense re-
tardati process-
us.

SHEAFE *against* ROWE and MUNCKLEY.

November 7.

John Rowe died of a fever, 2d April 1757, a minor aged near 20 years, made (as alleged) a will dated on 1st April 1757, wherein he appointed Alexander Sheafe, Esq. his uncle on the mo-

It is usual to plead affection to the family of a legatee as well as to the legatee himself. It was the ancient practice

in cases of insanity that the witnesses should speak to particular acts under the general plea. Very desirable to revert to this practice.

PREROGATIVE
COURT.

Michaelmas
Term,
November 7.

ther's side, and Philip Lindy his executors, gave a legacy of fifteen hundred pounds to his aunt Susanna Sheafe, sister of the executor, and other legacies, and devised the residue to two other persons, and left nothing to Theophilus Rowe and Sarah Munckley who were his uncle and aunt and next of kin of the father's side. Theophilus Rowe entered caveat. Philip Lindy renounced the executorship, and was dismissed out of the cause. Mr. Sheafe cited and made Sarah Munckley a party, and then propounded the will against her and Rowe, who opposed it, and examined four witnesses. Rowe now gave in an allegation, pleading that deceased had great affection for Theophilus Rowe and Sarah Munckley, and for her son Nicholas Munckley, who deceased chose to be his guardian to take administration to his use to deceased's father, who died intestate in 1756, and was his guardian and administrator for him at the time deceased died; that deceased had a violent fever, which rendered him incapable of making a will on 1st April 1757, and in general a total incapacity, but did not plead any particular acts or expressions to shew insanity, and pleaded that his physician and apothecary saw him several times on 1st April, and were of opinion he was wholly incapable of making a will; that they were importuned by Sheafe or his sister or their agents to persuade deceased to make a will, but they refused so to do; and pleaded further that deceased did not send for the writer of the will or give him any instructions, but that he was sent for by and received his instructions from Mr. Sheafe or his sister or their agent; and that when deceased was well he wrote a plain legible hand, but the subscription

to the will was wrote in such an hand as shewed the utmost weakness ; this allegation was opposed in every part, because it was improper to plead affection to Nicholas Munckley, who was not a party in the suit ; that incapacity was pleaded too generally ; that they ought to specify some acts and expressions to denote insanity ; that the opinions of the doctor and apothecary could not be received, and that his not giving instructions to the writer himself was a negative that could not be proved.

PREROGATIVE
COURT.

Michaelmas
Term,
November 5.

JUDGMENT—SIR GEORGE LEE.

But I was of opinion it was usual and proper to plead affection to the family of a party as well as to the party himself ;—that the opinions of doctors and apothecaries concerning a man's capacity from the nature of his disorder were good evidence ;—that the writer could prove whether he had the instructions from deceased himself or from any other person, and possibly other persons might be present when the instructions were given, who could prove the same ;—that as to the incapacity being pleaded too generally, I was glad to find we were returning to the ancient practice, that under the general pleading the witnesses must set forth particular facts and expressions to shew insanity, otherwise their evidence would have no weight, which I thought much more conducive to a discovery of the truth, than leading witnesses by laying specials or expressions for them to swear to ; and the times and dates are often very material to be specially pleaded, yet in this case the particular hours on the first of April when the doctor and apothecary

**PREROGATIVE
COURT.**

**Michaelmas
Term,
November 7.**

were with deceased would come more properly from them than if they were specially pleaded, and the court would have more satisfaction in collecting from the evidence whether they were with the deceased near the time when the will was made.

I admitted the whole allegation as laid, and declared I hoped it would be a precedent for pleading in the same general manner in the like cases.

**2d Session
Michaelmas
Term,
November 28.**

**An unfinished
and unexecuted
paper establish-
ed as a codicil.**

BROWN and FARRANT *against* HALLETT.

Captain Thomas Brown, deceased, made a will dated 3d December 1754, completely executed, appointed his wife Margaret Browne, Stephen Law, Esq. and Mr. Henry Farrant, proctor, his executors and testamentary guardians for his children, and in case Mr. Law should refuse to be his executor &c., he appointed Mr. Arthur Pond to be executor in his stead. Both Law and Pond have refused to act. The deceased gave his the wife for her life the interest of 3,000*l.* and the lease of the house where he lived, and all his household goods, plate and linen, and 200*l.* to maintain her and the children till the 3,000*l.* should be invested in securities and produce interest; gave the residue to his four children, all minors; his sister Catherine Hatfield 100*l.*, his sister Mary North 50*l.* for mourning, and the same to his mother. In May 1757, deceased went to Ireland to visit his said mother and sisters, and re-

turned home in August, after which he frequently declared that they (his said relations) had used him and his wife ill in Ireland, and he would alter his will. Deceased was taken ill on the 19th August, and died on the 30th. On 25th August, in the evening, deceased being in bed, and his wife, niece, and maid-servant being in the room, he bid his wife fetch his will, and his niece bring pen, ink and paper; deceased read over the will, and then wrote himself the paper now pleaded as a codicil, wherein he appointed John Hallett, Esq. executor, and altered the legacy of 100*l.* to his sister Hatfield to 20*l.*, reduced his sister Mary North's and his mother's legacies to 10*l.* each, and gave to Mr. Hallett and Mr. Farrant two thousand pounds and two hundred pounds, in trust to be laid out and to pay the dividends to his wife for life; he wrote a few more words which shew he was going on to explain that devise, but left off abruptly, saying (as the witnesses deposed) that he was very much tired with writing. From that time he daily grew worse and worse, and did nothing more towards completing the paper; but when he left off writing, bid his wife take care of that paper and lay it up with his will. Hallet cited the widow and Farrant to see this paper propounded and proved as a codicil; they appeared, declared they did not oppose the codicil, confessed the allegation *modo et formâ*, wherein the above facts were pleaded, and waved all assignations; but Hallet examined three witnesses, who proved all the facts above stated, and that deceased was fully in his senses when he wrote said paper.

PREROGATIVE
COURT.
—
Michaelmas
Term,
November 23.

JUDGMENT—SIR GEORGE LEE.
As the deceased had declared he would alter his

CASES DETERMINED IN THE

**PREROGATIVE
COURT.**

**Michaelmas
Term,
November 28.**

will agreeably to this paper, and as it appeared he was in his senses,—had wrote it but four days before his death,—and was not in a condition to complete it ;—and as the guardians for the children did not oppose it, I pronounced this paper to be a codicil to the deceased's said executed will.

**November 28. Lock by her Guardian against SIR ATWELL
LAKE.**

In cases of distribution and succession to personal estate, the degrees of relationship are to be computed according to the civil, not according to the canon, law.

Mary Buckham died a spinster, intestate, in 1756 ; Elizabeth Lock, a minor, appeared by her guardian, who alleged her to be cousin-german twice removed and sole next of kin to deceased, and on her behalf prayed administration. Sir Atwell Lake appeared, opposed, and alleged himself to be second cousin once removed and one of the next of kin to deceased ; both interests being denied, they were pleaded. Lock examined several witnesses, and fully proved her relationship as alleged, and Sir Atwell in his answers confessed her to be cousin-german twice removed to deceased, but denied her to be sole next of kin, and insisted that he was in equal degree with her ; he gave in two or three allegations, but did not examine one witness, and afterwards his proctor declared he would not proceed any further in the cause, whereupon the cause was regularly called on and assigned for hearing.

JUDGMENT—SIR GEORGE LEE.

In this case I said there was no doubt but that I must grant administration to the guardian for the

use of Lock, for she had proved her relationship, but Sir Atwell had made no proof at all of his; but farther, upon his own stating, she was clearly nearer of kin to the deceased than he, for in matters of distribution and succession to personal estates the degrees of relationship were to be computed according to the civil law, and not according to the canon law: and by the civil law, a cousin-german twice removed was in the sixth degree of consanguinity to the intestate, whereas a second cousin once removed was by that law in the seventh degree.

Sir Atwell's counsel contended that he ought not to be condemned in costs; but as he had put Lock to considerable expence (her proctor's bill amounting to 109*l.*), though he knew and owned her degree of relationship, I condemned him in costs, and taxed the bill according to the Registrar's report at 70*l.* (Vid. Vinn. Com. in Inst. de Nupt. 11. 4, and de Grad. Cogn. in paragraph.)

PARROGATIVE
COURT,
—
Michaelmas
Term,
November 23.

ARCHES COURT OF CANTERBURY.

ROBINS against SIR WILLIAM WOLSELEY, BART.

Dr. Hay for Robins.—This cause was appealed from Litchfield in October 1753. Sir William brought a suit against Ann Whitby, alias Robins, alias Dame Ann Wolseley, for divorce for adultery,

Abi not proved. Where a witness is grossly perjured, no credit in law can be given to his testimony. The declaration of a dead person is good administricular proof in support of other witnesses, but not of itself sufficient to support facts contrary to his own acts. In a suit for divorce by reason of adultery, a previous marriage which had been pleaded in bar, substantiated.

4th Session
Michaelmas
Term,
December 1.

Witnesses to
whose general
character there
is no exception,
are not to be re-
jected on con-
jectures and
suspicions.

ARCHES
COURT.

Michaelmas
Term,
December 1.

pleaded his own courtship and marriage to Ann on 23d September 1752, in their parish church of Colwich in Staffordshire, and that she in October 1752 left him, and lived in adultery with John Robins, Esq. She pleaded in bar to his suit that she was the wife of John Robins, Esq.; pleaded that he courted her from April 1751 to June 1752, and that she was married by Mr. Corne to Robins on 16th June 1752, at Castle church in Staffordshire; and prayed that she might be pronounced to be the wife of Robins and might be dismissed from Sir William's suit. Sir William denied her marriage with Robins, and insisted that she was his wife in order to obtain a divorce from her. The Judge below admitted the libel and her allegation, and received a witness *de bene esse* on the libel, from which she appealed. This Court pronounced for the appeal, and retained the cause, since which we have pleaded a contract between her and Robins *in verba de præsenti* in writing, dated 1st April 1752, which is signed by the parties, and attested by Richard Derry and Mary Nutt; the actual marriage on 16th June 1752 is proved by Derry, who was present; he is a servant to Mrs. Robins; he says that on 15th June 1752, Robins came and dined with his mistress at Whity Wood, in the parish of Colwich, and that soon after he went away, he by his order followed him to Stafford, and there witnessed for him the licence bond; swears she rode behind him to be married; Mary Nutt swears that her mistress, said Mrs. Robins, on 15th June told her she was to be married to Robins the next day; that the said Mrs. Robins went out at five in the morning on the 16th June, and said when she came home she was married. John Baily confirms these witnesses,

and says he saw Mr. Robins go into Castle church early in the morning of 16th June, and a woman. Dickenson, the parish clerk of Castle church, speaks to a declaration of Corne's that he had married them. The licence bond and warrant is dated 9th June; there is an entry in the register of Castle church, on which said marriage on 16th June is entered. Mr. Brookes, a witness, swears he saw the entry fair and without a rasure in January 1753. She went on 12th October 1752 and lived publicly with Robins. She at first kept her marriage secret to avoid losing the guardianship of her children. John Dunn, Sir William's witness, says, in October 1752 he saw the said register, and the entry appeared to him to be fair. Sir William has pleaded that Corne married Robins and Ann on 9th October 1752, subsequent to his marriage with her, William Thompson has sworn to this fact, who was servant to Mr. Robins, but has since lived with Sir William, and he has likewise pleaded affidavits and declarations of Corne, which we shall oppose reading; we shall shew that Thompson is perjured, and that Corne was guilty of forgery. Sir William has also pleaded that she signed marriage articles with him by the name of Whitby on 23d September 1752, the purport of which were that she should have nothing out of his estate, but he should have 300*l.* a year out of her jointure. She says the said articles were signed on 26th August 1752, and that she was compelled to sign them when she was intoxicated by something given her by Mrs. Clements, whose husband is said to have married Sir William and her; Clements demanded and received a marriage fee from Mr. Robins on account of his marriage to said Ann. Objections have been made to Derry's and

ARCHES
COURT.

Michaelmas
Term,
December 1.

ARCHÆS
COURT.

Michaelmas
Term,
December 1.

Nutt's depositions ; viz. that Mr. Robins was sick on 16th June and not able to go to Castle church. Sir William has pleaded a letter from Ann to him, which he says she wrote on 29th August 1752. The single question is, whether Ann has proved her marriage to Mr. Robins on 16th June 1752 ?

Dr. Smalbroke for Sir William.—Mrs. Whitby, alias Robins, brought in the written contract in November 1755 ; it is in proper words of the present tense, wherein they agreed to solemnize marriage on or before the 31st August 1752. The morning of 16th June was excessively wet ; Mr. Robins was then very ill. Corne, as a surrogate, passed the licence in June 1753 ; Corne declared to the Bishop of Litchfield that he did not marry them on 16th June, but did on 9th October 1752 ; he made an affidavit in order to be exhibited in the King's Bench. Corne died 22nd November 1753, he is supposed to have died of concern for this transaction. Substance of his affidavit, that on 7th October 1752, Mr. Robins desired him to marry him and Ann in a private manner ; he at first refused, but on 9th October he married them at Robins' house between 11 and 12 at night, and antedated the marriage to 16th June because, as Robins said, she was with child. The marriage bond and warrant were dated 9th June. The first entry in the register was on 9th June, and to make the entry tally to the proper time, he erased the entry of the burial of one Elizabeth Ward. Mr. Nicholls, attorney at Stafford, asked him why he made the entry on 9th June, when it was known Robins was then at Lord Uxbridge's. Corne thereupon consulted Mr. and Mrs. Robins, and an attorney at Stafford, one Hicken, and they agreed

he should alter the entry from the 9th to the 16th June. Corne returned the licence bond and warrant to the office on 18th December 1752. He made three returns from 9th June to Christmas; the first on 19th June, the second on 30th September, and the last on 18th December 1752. The marriage between Robins and Whitby was declared on 12th October. The bishop hearing complaint of Corne, sent for him in December 1752, Corne consulted Robins and Hicken; they advised him to stick to the marriage of 16th June, and promised him, that a note of indemnity which had been given him for this marriage, should be exchanged for a bond; accordingly Corne told the bishop the marriage was on 16th June, and that they at first intended the marriage should have been had on 9th June. When he returned from the bishop, he received on 23rd December a bond of indemnity signed by Mr. Robins and witnessed by Hicken. In March 1753 Corne first discovered to Michael Peak that what he had told the bishop was false, and said he was very uneasy to discover the truth. Peak gave hints of this to Master Elde. The bishop being told thereof, in June 1753 called on Corne, who confessed he had before imposed on the bishop and then related to him some of the above facts; six weeks after he went again to the bishop in company with Mr. Boothby, and told him further particulars, and Boothby going out of the room, Corne owned that he had erased the register. There is in the register a note pinned to the leaf stating the rasure. Sir William has pleaded marriage articles executed on 23rd September, which at Ann's request were executed in Colwich church; two separate agreements were executed at that time,

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signed by each respective party ; that signed by Sir William is in her hands ; he has produced that signed by her ; it is dated on 22nd September, though executed on the 23rd, and the word September is on a rasure. Mr. Victor, who drew them, says he was with Sir William on a visit in July 1752, when Sir William told him he was going to marry Mrs. Whitby, that she desired it might be secret, and that Victor might give her away. Victor desired thereupon to talk with her ; on the 18th or 19th August she sent for Victor, he went to her, and told her he was going to Ireland soon, and as he was to give her away, desired she would fix a day for the marriage. She named the 25th August, and he told her the necessity of her renouncing her right of dower on the Wolseley estate. She objected at first, but on the whole thinking she consented, Victor settled the articles with Sir William, and dated them 22nd August. On Sunday 23rd August she sent for Sir William, who carried with him the articles. Sir William told Victor she objected to them. On the 29th August Victor wrote to her to persuade her to renounce dower ; same day she wrote to Sir William, referring to Victor's letter. On the 23rd September the articles were produced in Colwich church, and August was erased and September written instead thereof, but the figures remained ; the subscribing witnesses Mr. Wolseley and Parson Clements, and Mrs. Clements was present ; the witnesses have said they were executed in a window on the right hand of the church going from the road, which window was in Sir William's seat ; objected that there was no such window in Sir William's seat, or at least none that could be written upon. Ann has pleaded that she was at

Clement's house on the 26th August, and that Mrs. Clements gave her a glass of something that deprived her of her senses; when she was a little recovered she saw Mr. Clements standing near her with a book in his hand reading; she was then forced to sign a paper she did not know the contents of; there are witnesses to her declarations that she remained intoxicated till 11 at night, and that she did not go out of Clements' house except into the garden. Sir William and Clements on 27th August came to her house and talked to her to this effect; that he (Sir William) hoped she remembered that she was married to him the night before; she said it was an imposition on her; that the paper she had signed was by force, and desired he would restore it to her; he replied that if he had taken advantage of her it was because he loved her. Strange fact sworn to by Mary Nutt; she finished and signed her deposition 13th June 1755: she came again on the 18th June to be further examined without notice to the adverse proctor. On the 28th June Derry was examined; both swear that Clements forced himself into Mrs. Whitby's bed chamber, took her by her arms, and pulled her out of bed; this was said to be done between the 23rd September and the 1st October 1752. On the contrary we have proved she played at cards and supped at Clements' the night of 16th August, and that she wrote a letter to Sir William on 29th August, and that she met him at Clements' on 23rd September.

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Dr. Bettesworth same side. —A declaration of her's in July, that she had refused Robins, and

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Mr. Robins executed a deed renouncing to Sir William all right to his jointure.

Evidence for Robins.

1st article of her first allegation pleads Robins' courtship to her, and that they contracted themselves; prayer of that allegation, that Sir William may not proceed, and that it may be pronounced that John Robins and she were contracted and afterwards married.

Witnesses.

1. Richard Derry, examined 15th December 1755.—Deponent has often seen Mr. and Mrs. Robins write, and knows their hands; the contract H, dated 1st April 1752, is Mr. Robins's hand, and is signed by him and Ann Whitby; deponent saw them sign it, and deponent and Mary Nutt, who was also present, witnessed it at Mr. Wilson's at Islington.

1. Int. It was signed in a ground room.

2. Mary Nutt examined on 20th December 1755.—The same; proves handwriting and signing the contract by both.

1. Int. Same as last witness. 4. Int. Ann told deponent she and Derry were to be witnesses to the contract. Derry to said interrogatory says the same.

N. B. To all the interrogatories she and Derry swear in the same words. Derry to the 10th Int. the Int. itself,—Did he not make affidavit in the K. B.? answer—Respondent did make affidavit; does not remember he did particularly swear to the marriage or contract.

Mary Nutt to 1. Int. *5to loco.*—Did not make affidavit as to the contract of marriage.

On another allegation.

1. Richard Derry, examined 20th June 1755.—Twenty years ago deponent went to live as a servant with producent. On the 26th August 1752 producent went to Mr. Clements', and dined there, and came home about 11 at night; Sir William came home in the coach with her; she then staggered and seemed very much intoxicated; she got up stairs with great difficulty; Nutt said she was so ill, she sat up with her, and she remained very ill some days; next morning Sir William came; producent went down to him; Mr. Clements came several times; deponent heard him persuade her to marry Sir William; she refused; Clements replied, then she must take what followed, for by God Sir William had given him 1000/- to indemnify him, and he would swear any thing to serve Sir William, and asked her how she would help herself, and whether she had not better make it her own act in marrying Sir William, than run the risk of being exposed; she replied, let the consequence be what it would she would never marry Sir William; deponent listened at the door at another time between the 23rd September and the first of October 1752; Clements went into producent's bed chamber when she was ill, and deponent and Nutt standing at the door, heard him say that she was not ill, but must and should get up and go to Colwich church to be married to Sir William, and then all would be well; she bid him begone for a vile scoundrel, and then she screamed out, and Nutt went into the room; at the beginning of October 1752, Sir William and Clements being with producent, deponent and Nutt stood at the door and heard producent ask them for the paper she had signed;

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they answered, that the paper was a marriage agreement between her and Sir William, and since she was so damned obstinate that she would not marry him, they would keep it; 15th June 1752 Mr. Robins and Mr. Nicholls dined at producent's house, and after they were gone, producent sent deponent after Robins, and bid him privately tell him she desired an answer to what he knew of; deponent went to him at Stafford, and delivered the message; he bid deponent stay; soon after Robins called deponent in, and signed a bond for a licence as he said, in presence of deponent and William Thompson, Robins' servant, who attested it, and then Robins gave deponent a letter for producent, and bid deponent tell her every thing was ready, and he expected to meet her the next morning; deponent delivered the letter and message to producent, and after she had read the letter, she ordered deponent to be ready to go out with her on horseback the next morning at four o'clock, and not to put on his livery; between four and five o'clock next morning, being the 16th June 1752, she went behind deponent on horseback to Castle church, where she said she was going to be married to Mr. Robins; they went and found him, his man William Thompson, and Parson Corne; and deponent there saw the said Mr. Robins and producent married together by Corne in presence of deponent and said William Thompson, and then deponent carried producent home again, and they got home about eight in the morning; about a week after Robins came and lay at producent's house, and, deponent believes, with her.

2. Int. The licence bond was executed by candle-light, he believes about ten at night. 3. Int.

Never as he best remembers had any discourse with any one about Sir William's courtship of producent, but in the morning of 26th August deponent was compelled to sign a paper by Sir William, declaring, he had said what was contained in said paper. 4. Int. Never declared he had talked to producent against marrying Sir William. 5. Int. Respondent lodges at Leicester and lives on what he has got.

2. Mary Nutt, examined 13th June 1755.—On the 26th August producent dined at Clements', came home at eleven at night, was then quite intoxicated and staggered very much; producent was very ill; when she came to her senses producent said she was made so ill by what Mrs. Clements had given her, and that she had been ill used there; she continued very ill for three or four days; on the 27th August Sir William came to her; deponent told her he was there, she exclaimed much against him, and said she would not go to him, but at last she went to him; she left the door open, and deponent listened at the door, heard her tell him the glass of wine Clements gave her had almost killed her; he said he hoped she remembered he was married to her last night; she said it was false, he replied, surely the fit she fell into had not made her forget all that had passed; producent was in a great passion, said she never was married to him in her senses, and never would be; heard producent ask him for the paper they had made her sign the night before, and what were the contents of it; he replied, "You was married to me last night, and Mr. and Mrs. Clements will swear it, and if any advantage was taken it was owing to my love for you, and if you will go publicly to the church and be married to me, I will do everything to make you happy, but if you remain obstinate I

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will bring my coach and take you to my own house by force; and as to the paper writing, you shall never have it, I will keep it." She replied, "All your threats shall never make me marry you, and she believed there never was so base a plot;" producent soon after came up stairs and flew into a great passion of crying, and told deponent that Clements pressed her to stay to dinner, and afterwards Mrs. Clements brought her a glass of wine, which made her soon sick and vomit, and afterwards she was quite stupid, and when she came to her senses she saw Sir William and Clements and his wife standing by her, and Clements had a book in his hand; she told deponent she was so ill that she had vomited in the coach, and deponent went and looked and saw somebody had vomited in the coach; well remembers that on the 21st September Sir William came to producent, and the door being left open, deponent listened and heard Sir William tell her that he heartily begged pardon for what he had done, that he had used her ill, but it arose from his love; but since she was so averse to him he would trouble her no more; she replied she was glad he had some remorse; he said he would leave the country and she should never see him again; she answered that before she forgave him, she insisted to have the paper she signed on 26th August delivered up to her; he replied it was in Clements' custody, and he would make him give it up; 22nd September Clements came, producent told him what had passed the day before, and insisted on having the paper; he said, upon his soul she should have it the next day if she would call at his house; 23d September producent went, as she said, to Clements', and staid till eleven at night; producent afterwards told deponent she could not get

the paper from him, and that Sir William came there, and producent told deponent she was never out of Clement's house but in his garden whilst she was abroad that day; in the beginning of October 1752 Sir William and Clement came to producent's, the deponent and Derry listened at the door, heard her ask them for the paper signed 26th August; they both said that the said paper writing was a marriage agreement between Sir William and her, and said since she was so damned obstinate and would not marry Sir William, they would keep it and make what use they pleased of it; deponent was not present at producent's marriage to Robins; believes they were married on 16th June 1752 as she well remembers that on the 15th of said June at night, producent bid deponent call her up at four o'clock in the morning, and desired deponent to lend her deponent's green Joseph and hat, for she was to go out between four and five o'clock in the morning, and she then told deponent as a secret, that she designed to be married the next morning to Mr. Robins, and that they were to meet at Castle church, near Stafford, and Mr. Corne was to marry them; producent went out the next morning between four and five, and came back about eight of the clock, and then told deponent she had been married to Mr. Robins, and they several times after said 16th June lay together at producent's house, and deponent saw them in bed, and the first time was in said June.

On the 18th June 1755, this witness came again to the examiner, and told him she had forgot some things which she desired she might add to her examination:

17th Art. Since her examination she recollects from notes she had made, that John Clements was

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twice at producent's house between 23d of September and 1st October 1752 ; and the first time deponent heard him tell producent, she had better be publickly married, for he was ready to swear he had married them privately on 23d September ; and the second time he came, deponent heard him tell her she was not ill, and she should get up and go to church and be married to Sir William ; she called him a vile scoundrel and cried out ; deponent went into her room and found him pulling her out of bed ; Sir William was once during said time with producent, and he heard him threaten to carry her to his house by force.

3. John Bailey, husbandman, exd. 10th July 1755. — Deponent was servant to William Corne, clerk, for two years ending at Michaelmas 1752 ; on 16th June 1752, Corne ordered deponent to attend him about five in the morning to Castle church ; deponent did, and saw Mr. Robins and his man in the church-yard, and soon after a man and woman on horseback came to the church-yard and alighted, and they all five went into Castle church, and after staying about half an hour the man and woman and the rest of the company came out and went away ; Corne bid deponent not speak of what he had seen.

12. Int. Respondent was present at a marriage in July last but cannot tell the day.

N. B. All the witnesses deny corruption or combination.

4. William Brookes, Esq. — On the 15th January 1753, deponent was applied to by Mr. Robins to take a copy of the entry of his marriage with producent ; Corne produced to deponent and John Hickin the entry of said marriage in the register of Castle church ; deponent took

a copy thereof, it was then a fair entry, and deponent is certain no part of said entry was then wrote on a rasure, nor was there any interlineation or obliteration or any paper pinned thereto.

5. John Blakemore.—Deponent was coachman to producent; deponent went with the coach on 26th August 1752 to fetch producent home from Clements'; and Clements' son James, then about nine years old, told deponent producent had been in a fit, and his father had with a book been preaching over her, and that his mamma and Sir William were in the room, and his mamma said to Sir William, "I told you it would lay her asleep, and then you might be as happy as you could wish;" producent and Sir William came home together in her coach; she staggered very much and vomited in the coach; deponent stopped and asked her how she did; she said, "Very ill;" Sir William was in the coach with her and said nothing; deponent afterwards carried him home.

6. Thomas Wood, writer.—Exhibit D. is deponent's handwriting; on the 9th May 1754, William Thompson freely set his name to it; Margaret Hales was then present; by deponent's desire Sir William read it all over, and declared that he signed it to satisfy the world of the truth of the fact of Mr. Robins's marriage with Mrs. Whitby, and said it (meaning the paper) was true, as he had a soul to be saved, and clasping his hands together, wished he might never enter into heaven if it was not true; and deponent and Margaret Hales attested it.

7. Wynde Buckeridge, gent. exd. 25th August 1755.—Deponent is deputy register of Litch-

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field; proves copies of bond and warrant for licence of marriage between Robins and producent; the bond is attested by Richard Derry and William Thompson, and the warrant is signed by William Corne as surrogate.

1. Int. Between May and Christmas 1752, Corne made three returns of licences to the office; the first on the 19th June, the second on 30th of September, and the third on 18th December, at which last time the bond and warrant for the licence for the marriage of Robins and producent were returned; Corne was very punctual in his returns. 4. Int. Believes he would have returned them sooner if the licence had been executed.

Contract read, dated 1st April 1752, recites intention to marry, and then in words of the present time, they take each other mutually for husband and wife, signed by Richard Derry and Mary Nutt, as witnesses, and signed by Robins and producent as parties.

Exhibit D. read, dated May 9, 1754: William Thompson promises to declare on oath that he was present on 16th June 1752, with Richard Derry, and saw Mr. John Robins and Mrs. Ann Whitby married together, and deponent was a witness to the bond relating to said marriage.

Read for Sir William, part of his allegation.

21st Article alleges that Corne made an erasure in the register.

23d Article alleges declaration of Corne concerning his having married them on the 16th June 1752.

24th Article. Mr. Robins on 9th June took out a licence.

For Robins.

8. Thomas Ward, farmer, exd. 9th July 1755.— At the end of September or beginning of October 1753, Philip Seckerson, clerk of Castle church, asked deponent what his child's name was, which was buried at Castle church, and what was his and his wife's name, and when the child was buried ; deponent told him his name was Thomas, his wife's Mary, and the child's Elizabeth, and that she was buried 2d July 1752 ; Seckerson then said Mr. Corne had forgot to register said burial, and bid him ask deponent about it ; Corne being over the way, Seckerson called him and told him what deponent had said ; Corne thanked deponent, and said he would go and register it immediately.

9. Philip Seckerson, clerk of Castle church.— Deponent well knew William Corne ; on the 2d July 1752, Elizabeth Ward was buried by Corne at Castle church ; believes Corne did not make any entry of such burial, because in September 1753 he asked deponent if he knew the name of Ward's child, and where it was buried, &c., and desired deponent to enquire of Ward, the father, and said he had forgot to register it, and seemed to be very uneasy at it ; gives the same account as Ward does, of what passed between deponent and Ward ; deponent made an entry of it in his pocket-book ; in June 1752 Corne told deponent he had married a couple of fortune *that month*, and he should have his fee, but it was to be kept a secret as yet ; on the 12th or 13th October 1752, Corne told deponent that he had married Mr. Robins and producent on 16th June, which were the couple he had before told him of.

6. Int. In June 1752 and to his death Corne

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was often with deponent and seemed very uneasy.

Witnesses for Sir William Wolseley.

1. Bishop of Litchfield and Coventry.—In 1750 Deponent first knew Sir William; in the summer of 1752 deponent dined with him at his house in the country; Mrs. Whitby was there, and it was currently reported Sir William courted her, and that they were soon to be married; deponent afterwards heard they were married on 23d September 1752, and soon after deponent heard Mr. Robins was married to Mrs. Whitby by Corne, and also heard that Corne sometimes said he married them on the 9th, and sometimes on the 16th June 1752; Sir William having complained to deponent about said affair, in the beginning of December 1752, deponent sent for Corne, and required him on his canonical obedience to tell him the truth of that affair, and then Corne assured deponent gravely that he married Robins and Whitby between the hours of eleven and twelve on 16th June 1752, and said that none but they and their servants were present; they at first intended to be married on 9th June, but were hindered, which caused the report of their being married sometimes on one and sometimes on the other of said days; deponent came to town, where he heard that Corne had imposed upon him, and that he had told deponent a lie, and that he was ill thereupon from uneasiness of mind; on 9th June 1753 deponent called on Corne at his house at Stafford; he then was very ill and emaciated from being a lusty, heathful man; believes his illness arose from his uneasiness of mind; Corne fell on his knees and with tears begged deponent's forgiveness, and confessed he

had imposed on deponent, and that all he had told him relating to said marriage was false, but if deponent would forgive him he would tell him the whole truth; deponent told him he had done a very wicked thing, and must beg forgiveness of God and tell the whole truth, and he would forgive him; he then declared that he did not marry Mr. Robins and Mrs. Whitby till the 9th day of October 1752; about six weeks or two months afterwards, said Corne and Mr. Boothby, a justice of peace, came to deponent's house together, and Corne again assured deponent that he did not marry them till 9th of October, and that he married them between ten and twelve at night at Robins' house in Stafford, at the particular entreaty of Mr. Robins, who told him the lady was with child and begged he would enter the marriage as on 9th June 1752 to save her reputation, and he being ignorant of her marriage with Sir William, entered said marriage with Robins on 9th June; and he not seeming willing to own one circumstance, deponent pressed him thereon, whereupon Mr. Boothby going out of the room, said Corne confessed to deponent that he had erased the register book in order to make an entry as on 9th June 1752; deponent cannot set forth the particular entry erased. Corne further confessed, that soon after the 9th June 1752, he heard Mrs. Robins say, she supposed Clements would swear he had married her to Sir William Wolseley; and Corne said that soon after Mr. Nicholls, an attorney, came to him, and asked him how he came to make the entry on 9th June when it was well known that Mr. Robins was on that day at Lord Uxbridge's, and also that Nicholls told him, Sir William was

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actually married to her, and that he, Corne, informed Mr. and Mrs. Robins and Hickin, their agent, of what Nicholls had said, and thereupon they all ordered him to alter the entry of said marriage from the 9th to the 16th June 1752, and that he accordingly altered it upon Mr. Robins giving him a note for one thousand pounds to indemnify him. Corne further confessed, that on deponent sending first for him, Hickin advised him to tell deponent he married them on 16th June, and by said Hickin's persuasion he had falsely declared to deponent; and soon after the note was exchanged for a bond, and Corne then shewed deponent said bond signed by Robins and witnessed by John Hickin. Corne further confessed that on a report that Ann was to be indicted at Lent assizes 1753 for bigamy, Hickin applied to him to go out of the way during the assizes, that he might not be a witness, and offered to give him money to bear his charges, but he refused; the latter end of October 1753, deponent met Corne in Stafford, and asked him how he did, and told him he hoped he was better now he had eased his mind, he replied, "I feel it here, and I fear it will kill me;" two or three months after deponent heard he was dead, and believes said affair broke his heart; Corne told deponent he made an affidavit on 2nd October 1753 concerning said affair to be exhibited in the King's Bench.

2. Robert Pardo.—Deponent has known Sir William many years; well knew William Corne, he was a very healthy man till lately; before his death he seemed very melancholy, and Corne owned to deponent that he did not marry Robins till late at night of 9th October 1752, and at their request he entered the marriage on 9th June 1752;

and Corne shewed deponent said entry, and it then appeared to be wrote on a rasure, and he owned he had erased an entry of a burial. Corne said he heard Mrs. Robins say she believed Clements would swear he had married her to Sir William, and Nicholls had asked him how he entered the marriage; deponent told him, and he said Robins was at Lord Uxbridge's on 9th June, and thereupon he altered the date to 16th June; deposes to all Corne's declarations which he made to deponent at the Summer assizes 1753, the same as the Bishop does; Corne said Hickin would not let him tell him the true account of the transactions, because he said that would hinder him from being a witness; deponent drew an affidavit for Corne to swear to in the King's Bench; believes this affair broke Corne's heart; deponent is solicitor for Sir William.

3. John Bird. Esq.—Deponent knows the parties well; knew Corne, who told deponent the facts in the affidavit, and swore said affidavit before deponent; proves said affidavit; Corne seemed very uneasy, and believes his heart was broke.

Opposition to reading Corne's affidavit.

Dr. Hay for Robins.—The rule of law is, that no evidence shall be admitted but what shall be under the examination of both parties. Style 446, the voluntary affidavit of a stranger cannot be given in evidence.

N.B. That was a dictum only, not a determination. 5 Mod. 163, 154, 165. 1 Lord Raym 729. Carthew, 405. 1 Salk. 281. 2 Lord Raym. 729. Information against Payne for a libel. Affidavit

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of a witness who died, not received, for it is not evidence on misdemeanors or civil actions, &c. .

Dr. Simpson, same side.—Corne was guilty of a clandestine marriage, and therefore excommunicated, and could not have been a witness. The substance of the affidavit is to exculpate himself. A voluntary affidavit is not evidence ; no affidavit made in or out of a Court can be read. Gilbert's Law of Evidence, Raym. 63, depositions taken before answer given in Chancery and issue joined are only as affidavits, and cannot be read unless the defendant has been in contempt. Same book, 65, a witness examined *de bene esse* before coming in of answer, dies, the deposition cannot be read. Law of Evidence 69, the same doctrine.

Dr. Smalbroke contra.—They might have cross-examined as to his affidavit, &c.

Dr. Bettesworth, same side.—Robins's allegation read, in which she controverts the purport of said affidavit.

Delegates, 6th March 1716, the affidavit of an intestate allowed to establish his marriage, *Sacheverell* against *Sacheverell*.

Per Curiam.

I was of opinion that the judgments upon this point had been various at common law ; all the judges resolved that depositions taken *ex parte* by a coroner, (a) the witnesses being dead, should be re-

(a) Founded on St. 1 & 2 Ph. & M. c. 13. s. 15. The authorities on this point are now concentrated in the excellent work of Mr. Phillips, (Law of Evidence, vol. i. 373.) See also Bulter's N. P. 242.

ceived as evidence in a criminal case, Kelynge 55. 1 Levinz. 80, *Brunswick's* case. Law of Evidence 121. c. 83. *ibid.* 124. 1 Salk. 278. 1 Show. 365. 3 Mod. 36. *Goodier against Smith*, Law of Evidence 127. c. 92. In the Spiritual Court affidavits of dead persons had been received. *Prerogative*, 7 March 1727, *Richardson v. Wagstaff*, and other cases. How far this affidavit would be evidence, or what weight ought to be given to it, would properly be considered hereafter, on the arguments upon the merits of the case; but I was of opinion it ought now to be read, and overruled the objection.

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Affidavit of William Corne, clerk, dated 2nd October 1753.—On 7th October 1752, and not before, Mr. Robins applied to deponent to marry him and Mrs. Whitby, and on 9th October 1752, between ten and twelve at night, deponent married them at Mr. Robins' house; Richard Derry, her servant, gave her away; Robins desired deponent to enter said marriage on 9th June; deponent did enter it accordingly on a rasure, and for the same reason deponent dated the licence 9th June; soon after deponent heard Mrs. Robins say she supposed Clements would swear she was married to Sir William Wolseley, at which deponent was much surprised, and desired Mr. Nicholls, an attorney at Stafford, might be consulted, but they disapproved of him and named Mr. Hickin; deponent did not see Hickin till the 11th of October, when Robins told him they were married on 9th June, and desired Hickin to search the register of Colwich for Sir William's marriage; he did, and said he could find none; Nicholls told deponent, Sir William was married to Whitby; Robins afterwards order-

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ed deponent to alter the register to the 16th June, which deponent did, and he gave deponent a bond of indemnity for one thousand pounds ; deponent pressed Robins to accommodate the affair with Sir William ; Hickin would not let deponent tell him the truth of the transaction, but Hickin desired deponent to make affidavit that he married them in June, but deponent refused ; Robins made affidavit that he was married in June, and deponent spoke to him of it with surprize ; Hickin pressed deponent to absent himself that he might not be a witness upon an indictment against Whitby for Bigamy.

4. Joseph Dickenson, clerk.—Deponent well knew William Corne ; proves entry in Register of Castle church, marked D.

5. Lewis Dickenson.—Proves exhibit D. ; knew William Corne, who several times told deponent said entry was false, and that he first wrote it 9th June ; declared he 'did not marry Robins and Whitby till 9th October 1752, but entered it 9th June to save her reputation ; deposes to Corne's declarations as the other witnesses did ; Corne died 22nd November 1753, and was buried at Stafford ; believes his heart was broke ; proves Corne's affidavit.

6. Phœbe Boothby.—Well knew Corne ; he often said he believed that unfortunate affair meaning Robin's marriage, would cause his death ; heard him ask Sir William's pardon, and said he had grievously injured him ; heard him say he had imposed on the Bishop.

7. Brooke Boothby, Esq.—Deponent knows the parties ; deponent received a message from Corne, desiring him to acquaint Sir William that if he would forgive him he would tell him the whole truth as to the said marriage ; Corne desired

deponent to go with him to the Bishop, and Corne then told the Bishop that Hickin advised him to insist he married them on 16th June. Corne said Robins desired him to make affidavit that he married them on 16th June, but he refused; confessed to the Bishop he had made a false entry. Corne said to deponent, that as he expected to die very soon, deponent might depend upon it that all he had said in his affidavit was true.

8. John Dunn. — Knows parties, and knew Corne. Deponent went to search the register of Castle church for the entry of Robin's marriage; the first time deponent went, Corne said he married them on 9th June, but when deponent saw the register it was entered 16th June.

3. Int. Never saw said register but when Corne shewed it to him; when respondent inspected it, it did appear to him to be a fair entry, and deponent did not observe any rasure, and there was no paper then pinned to it. Respondent did not carefully examine it as to the rasure.

9. Michael Peake, farmer.—Knew Corne; deponent married his sister; the entry in register of Castle church and the paper pinned to it deponent believes are Corne's hand writing; in March 1753 Corne told deponent that all he had said about said marriage was false, and that the entry was false, and that he did not marry them till the 9th October 1752, and that he had imposed on the Bishop; Corne told deponent Robins wanted him to swear to the marriage in June, but he would not; deposes the same as the other witnesses to Corne's declarations and that he told deponent he had made a full and true confession to

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the Bishop. He was very uneasy in mind and apprehensive of being set in the pillory for the false entry.

3. Int. Has several times heard Corne say he married Robins in June 1752.

10. William Scott, gent.—Deponent is bailiff to Lord Uxbridge; swears that Mr. Robins came to his Lord's house on 29th May 1752, and on 9th June 1752 he was very lame, and not able to stir without assistance, and deponent was with him almost the whole day of 9th June, and Robins was not out that whole day from Lord Uxbridge's house.

2. Int. Deponent had a child baptized 16th June 1752, as he believes the day to have been, and Robins was godfather, and present at said christening, and slept at respondent's house that night. 3. Int. Respondent has frequently heard Corne say he married Robins on 16th June.

11. Benjamin Victor, Esq.—Deponent first knew Sir William in 1729; on 16th or 17th July 1752 first knew Ann Whitby. Deponent left Wolseley Hall on 29th August 1752, and while deponent was at Sir William's, Ann often declared herself to be a widow. Sir William told deponent she had agreed to marry him, and that she desired the wedding might be speedy, and that nobody but Clements and his wife and deponent might be there, and that deponent might give her away. Deponent desired he might have some talk with her alone; on 18th or 19th August she sent for deponent, and deponent told her he was going out of England soon, and she must fix a short day if he was to give her away, she named the 25th August; deponent having mentioned the necessity of her re-

nouncing all claim on Sir William's estate if she survived him ; she replied, " I will do all I can to shew myself a friend to Sir William's family." Deponent looking on what she said as a consent, he and Sir William settled the articles C., and dated them 22nd August, to be signed the next day, but she then refused to execute such articles ; does not know when they were executed, believes the word September in the date is Sir William's writing and the rest is deponent's.

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Int. read. Do you know of a pamphlet called the Widow in the Wood, did not you write or cause it to be wrote, and by whose order?—Ans. That he knows of such pamphlet, and further he is not bound to answer.

12. Richard Wolseley, Esq.—Deponent is nephew to Sir William; has known Ann Whitby about four years, on 23d September 1752 deponent was at Colwich church, and there saw her execute the articles dated 22nd September 1752 ; and deponent and Mr. Clements were witnesses to said articles, and to a counter-part then executed by Sir William ; does not know the contents of said articles ; those marked C. were originally dated 22nd August.

13. William Thompson.—Deponent was servant to Mr. Robins to his death. On the 9th October 1752, deponent was present about eight or nine at night, and saw and heard William Corne, clerk, marry said John Robins and Ann Whitby, and about a week before deponent heard Robins ask Corne to marry them ; has heard her say she supposed that rogue Clements would swear he had married her to Sir William. During the whole month of June 1752, as he best remembers, Mr.

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Robins was at Lord Uxbridge's, and was ill all that time. Mr. Robins, on discovery of the truth of the marriage, went to France.

2. Int. Respondent lives at Sir William's, but is not in his service. 3. Int. Has known Thomas Wood some years; in May 1754 deponent, to oblige Mr. Robins, did declare to said Wood in presence of Margaret Pidgeon that Robins and Whitby were married 16th June 1752, and that he and Richard Derry were present on said 16th June, and saw said marriage performed by Corne, but he never intended to swear thereto; respondent was a witness to a bond relating to said marriage. 4. Int. In May 1754, deponent did sign a writing that it was the 16th June 1752, when he was present at such marriage, and such writing was witnessed by Thomas Wood and Margaret Pidgeon; but deponent did not at any time clasp his hands together, and wish he might never enter into heaven if it was not true.

14. John Clements, clerk. — Knows the parties by being vicar of Colwich; on 23d September 1752 Ann Whitby executed the articles marked C. in Colwich church in presence of deponent and Richard Wolseley who attested them, and a counterpart was signed by Sir William; they intended to have been married on 25th August, and the articles were to have been executed on 22nd August, but deponent advised her to consult her brother Mr. Northey, which put off the marriage; sets forth the purport of those articles Sir William signed, which were delivered to her; substance thereof—Sir William to have 300*l.* a-year of her jointure, and he to make such provision for

children by her, as he had settled on his younger children by his first wife.

4. Int. 13th November 1752, deponent sent Walter Cartwright to Mrs. Robins, for two modus's due to him as vicar of Colwich, out of her estate, and bid him tell her, that if she was married to Mr. Robins on 16th June 1752, there was a fee due to him for such marriage, but did not otherwise demand any fee; Mr. Robins paid to Cartwright a fee of five shillings, for which he gave him a receipt, and Robins also paid him the moduses.

15. Mary Clements.—The end of August 1752, Mrs. Whitby said to deponent, "Mrs. Clements, they are always raising stories of me, they said I was going to be married to Mr. Robins before my husband was cold, but I must do Mr. Robins the justice to say he never asked me the question, and I will swear it;" on 23d September 1752, deponent was present in Colwich church, and saw said Ann execute her part of articles with Sir William.

14. Int. They were executed in one of the windows of said church; Ann desired they might be executed there for privacy, and said Ann delivered the part signed by Sir William to deponent's husband to keep for her.

16. Edward Whitby, Esq.—Deponent was brother to Ann's first husband; 15th July 1752, deponent dined with her at Whitby Wood, she asked deponent if he had seen Mr. Robins, and said he had proposed himself to her, but she had refused him.

Marriage articles marked C. read.

Ann agrees to claim nothing out of Sir William's

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estate, if she survives him, but agrees to pay him 300*l.* a year out of her jointure.

On Sir William's Allegation, dated 16 June 1755.

1. John Clements, clerk.—On or about 26th August 1752, Ann dined with deponent, and in the afternoon Sir William was sent for at her desire, and she then seemed uneasy at Sir William's having examined her servant, and she cried and seemed to faint away ; Sir William called for hartshorn, which she drank, and soon after fell into an hysterick fit, and during the fit, often cried out, “ That damned rascal Victor has done this to break the match,” and cried out, “ I love Sir William, where is he ? ” Sir William asked deponent's wife if she ever heard any body talk so rationally in a fit ; deponent had not any book in his hand ; after the fit she was very merry, played at cards, and supped at deponent's that night ; 23rd September 1752, she again came and dined at deponent's house, and after dinner, at her earnest request deponent fetched Sir William and his nephew, and she signed the articles that afternoon in Colwich church.

2. Int. On Sunday, 23rd August, deponent was present when Sir William gave her a paper to sign, and she said she would consider of it. 3. Int. On 26th August Ann went up stairs after dinner to dress herself, and then drank a glass of the same wine they had drank at dinner, and she afterwards fell into a fit. 4. Int. On 21st September 1752, she dictated to respondent at his house certain articles of agreement, and by her direction, after deponent had written them, he delivered them to Sir William ; deponent wrote them by her direction, but can not say how she became skilful

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enough to dictate marriage articles; they were dated 21st September, and afterwards some alterations were made, and respondent wrote said articles over again on stamp paper by her desire; cannot set forth where he bought the stamps; he engrossed them on stamps on 23d September, and had them in his custody till 8th or 9th October following, and they are the same articles Sir William executed. 5. Int. Before they were executed, the articles signed by Ann were in Sir William's custody, and believes Sir William brought them with him on 23d September, and they were executed in the window in Sir William's seat in Colwich church; the two parts were not duplicates, one signed one set of articles, and the other party signed the other set. 6. Int. Ann delivered the articles signed by Sir William to keep for her, and she so delivered them in the church, and deponent kept them till 8th or 9th October, when Ann sent for them, and deponent delivered them into her own hand.

2. Mary Clements.—Deposes the same as to her fit on 26th August, and as to what Ann said when she was in the fit. She afterwards played at cards, supped, and was very merry at deponent's house that night; contradicts, as does her husband, the depositions of Blakemore, the coachman. She again dined at deponent's on 23d September, and by Ann's desire, Sir William was sent for, and she that afternoon signed the articles in the church.

3. James Clements, aged 16, examined in 1755.—Swears precisely to 26th August, and gives his reasons for remembering the day when Ann and Sir William were at his father's house; says she supped there, and was very merry. Swears

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he never told Blakemore what he said Blakemore has deposed to.

4. Elizabeth Clements, aged 18.—Swears Ann supped and played at cards the evening of 26th August at Clements' house. Deponent heard nothing of what is deposed by Blakemore; 23d September Ann again dined at Clements', and Sir William was sent for.

5. John Aston.—Deponent was servant to Clements; in August 1752, Ann dined at Clements', and had a fit, but afterwards was very merry, played at cards, and supped there, and about a fortnight afterwards again dined there, and she was at six in the evening in Colwich church, and she did not go home till about ten o'clock.

6. Mary Boreham.—Deponent was servant to Clements in August 1752, when Ann dined there; believes Ann had a fit there, but afterwards she played at cards and supped there, and about three weeks afterwards Ann dined there again, and that afternoon deponent saw her and Mrs. Clements in the church-yard.

7. Mary Goodwin.—On 23d September 1752, about five or six in the evening, deponent saw Ann and Mrs. Clements in the church-yard.

2. Int. Believes she may have said she did not see Sir William and Ann come out of the church together.

8. William Thompson.—Some time about 9th October 1752, but cannot be certain as to the day deponent and Richard Derry witnessed a marriage bond executed by Mr. Robins, is certain it was not before October.

1. Int. In May 1754, deponent, by the direction of Mr. Robins, went to the house of John Dearle,

but did not see him, nor did respondent then, or at any other time, go to Dearle's house with intent to swear to the marriage of Mr. Robins with Ann Whitby on 16th June 1752, or ever request Dearle, or any other person, to swear him to an affidavit that they were married on 16th June 1752; neither had respondent at any time, any discourse with Dearle about making such affidavit, nor did he ever apply to Thomas Wood or any other person, to put down in writing what he was willing to swear; but Wood came one day to Mr. Robins, and put down a declaration in writing, purporting to testify that deponent was present and saw them married on 16th June 1752, and that he was a witness to the bond relating to such marriage, and was ready to testify the same on oath when required; but deponent did not request Wood to put down such memorandum, nor did deponent ever sign such memorandum or declaration, and there was not any one present when Wood made such memorandum, but deponent and Mrs. Pidgeon.

N. B. This witness has flatly perjured himself in his answer to this interrogatory.

9. Benjamin Victor, Esq.—On 26th August 1752, deponent was at Sir William's house, when Mr. Clements came and told Sir William Ann de-
sired to see him.

10. William Scott.—Deponent is sure Robins did not sign any marriage warrant before Corne on 9th June, for he was then at Lord Uxbridge's.

11. Richard Wolseley, Esq.—Deponent was not in Staffordshire on 26th August 1752; never witnessed any paper signed by Ann on said day; swears Ann was in Colwich church on the evening of 23d September 1752.

3. Int. The articles were executed in a window

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on the right hand of Colwich church, going into it from the road ; does not remember they were read over when they were executed. Deponent was a witness to them ; thinks he signed his name at Clements' house, and Clements as he best remembers first produced the articles. Two parts were then executed, one by Sir William and the other by Ann.

Witnesses for Sir William on another Allegation in 1756.

1. Benjamin Victor, Esq.—To declaration of Derry, dated 21st August, 1752 ; deposes that Derry acknowledged the contents to be true, and voluntarily signed it, and did not then say his mistress was married to Robins. Deponent wrote to Ann on Saturday 29th August 1752, relating to her marriage with Sir William, which was the only letter he ever wrote to her, does not know her hand-writing.

3. Int. Derry signed a paper drawn up by respondent to confess his crime in having reflected on his mistress. The paper was wrote on 21st August, deponent drew it up ; upon being told what Derry had said to Sir William's servants on 18th August, Derry was sent for on 21st, but he could not come till the 25th, and then the paper being read to him, and being told that if he would not sign it, his mistress would be informed of the scandalous expressions he had used of her, and that she would prosecute him for the same ; he thereupon did sign it in presence of respondent, Sir William, and Mr. Clements, and respondent and Clements witnessed it. 4. Int. 29th August respondent wrote to Ann, to induce her to sign the deed, to renounce all claims to the Wolseley

estate; deponent delivered the letter to Sir William's butler, and gave a copy of it to Sir William.

2. Sarah Nicholls, widow.—Deponent's husband on 15th June, 1752, met Mr. Robins at dinner at Mrs. Whitby's, and at nine or ten at night they came to Nicholls' house, at Stafford, in a one-horse chaise, and there with assistance Robins alighted and spent the evening at Nicholls', and did not stir from thence till twelve or one that morning, and then went home to his own house on the opposite side of the way. About eight o'clock next morning, William Thompson informed deponent that his master, Mr. Robins, was ill in bed, and wanted some strong wine. Deponent gave him some, and on said 16th June Robins dined with deponent's husband. Deponent thinks he was not well enough to ride that day to Castle church; proves letters from Ann to Sir William to be Ann's writing.

2. Int. Elizabeth Toukes, who was a servant to Robins, told deponent she would not remember any thing about this affair. 3. Int. Respondent has asked persons what they knew about Robins having been at her house on 15th June. 4. Int. Believes Robins dined with Ann on 15th June, and came from thence to Stafford, from whence to Castle church is one mile. Believes he was god-father to Mr. Scott's child in June 1752.

Ann's letter to Sir William.—Invites Sir William to come to her at eight that evening; says she was engaged to go out and should not be back till the evening; mentions that she had received a letter that morning from Mr. Victor; expresses regard for Sir William and his family; dated Saturday.

3. Elizabeth Toukes.—Says she cannot depose

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to any part of the allegation. (*N. B.* She was servant to Mr. Robins in June, 1752.)

1. Int. Respondent was servant to Mr. Robins on 16th June 1752; he might go out early in the morning of that day and return home without her knowledge. 2. Int. Knows Mr. Hickin.

4. Ann Vaughan.—Deponent servant to Nicholls; about ten at night on 15th June 1752, Robins came to Nicholls' house and staid there till between twelve and one in the morning, and the next day he dined at Nicholls'; he was then in a weak condition.

4. Int. Castle church is a mile from Stafford.

5. John Clements, clerk.—Derry read his recantation and signed it, and deponent and Victor attested it; it was signed on 25th August voluntarily.

3. Int. Confirms deposition; says Derry was not present when the recantation was drawn up; 29th August, 1752 was a Saturday.

Recantation read.

6. Abraham Lukin.—In August 1752, Derry said at Sir William's house, "The affair is quite indifferent to me whether my mistress marries Sir William or not, for she has promised to take care of me, for I can bring her on her knees for her former sins;" deponent was present when the recantation was read to Derry.

Sixth article of allegation charges a particular discourse between Derry and three of Sir William's servants.—Answer. He knows nothing of the contents thereof.

3. Int. Respondent heard Derry acknowledge the contents of the recantation to be true.

7. Thomas Greatholder.—Deposes to Derry's

declaration the same as Lukin, and proves the recantation.

7. Int. Deponent is coachman to Sir William; deponent has often said Ann was a wicked woman.

8. Mary Flint.—Derry declared to deponent after the 22nd of June 1752, that the match between his mistress and Robins was off, and said “They have quite broke off.”

9. Joseph Dickenson, clerk.—16th June 1752 was the archdeacon’s visitation at Stafford; it did not cease raining that day from seven in the morning till three in the afternoon; deponent saw Corne at Stafford at ten that morning.

10. Charles Howard, proctor.—On the 16th June 1752, deponent was up at five in the morning, when it rained violently and the roads were very wet, and it continued to rain violently till noon; deponent was with the archdeacon on his visitation that day.

11. Brooke Crutchley, gent.—On 15th June 1752, about ten at night deponent saw Robins come with Nicholls to Stafford, and he was helped into Nicholls’ house, about nine in the morning of 16th said June; deponent was with Robins; found him in bed, and he complained he was very ill; middle of July 1752 deponent went to see Mrs. Whitby, and she then said to deponent, “The affair is quite over between Mr. Robins and I, and I shall never have any thing more to say to him on that head, but I shall always be glad to see him as a relation;” and the beginning of said July Robins told deponent the affair between him and Mrs. Whitby was over, and William Thompson told deponent the same.

12. Catherine Crutchley.—Swears she went to

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see Mr. Robins, who was her brother, about ten in the morning of 16th June, and he was very ill, and said he could not get off his chair.

13. Richard Wilks, M. D.—The morning of 16th June 1752 was very wet; about ten that morning deponent went to visit Mr. Robins, who was unwell, and he then said he was so very weak that he had great difficulty in rising from his chair, and more in walking across the room, and said he was not able to ride on horseback.

3. Int. Robins was unfit to go to Castle church on 16th June.

Witnesses for Robins.

1. John Dearle, gent.—Between Easter and Whitsuntide, viz. in May 1754 William Thompson came to deponent's house in Stafford, deponent being a master extraordinary in chancery, and desired deponent to take his affidavit that he was present at the marriage of Mr. Robins and Mrs. Whitby, on 16th June 1752; deponent told him he had no commission to take affidavits in the Arches, and was so ill he could not draw an affidavit; he then asked deponent what he had best do in that affair; deponent recommended him to go to Mr. Thomas Wood, a writer, and get him to put down in writing what he was willing to swear, and send it to Mrs. Robins.

1. Int. About Christmas 1754, respondent received an affidavit from London concerning said marriage for Thompson to swear to, but he then said times were altered; deponent admonished him not to swear falsely; he replied that he did not deny but that the contents of said affidavit were true, but he should not swear to it.

3. Int. Believes Thompson was sent by Robins to deponent to take said affidavit.

2. Elizabeth Whitnall.—Deponent was servant to Mr. Dearle, and was present when William Thompson came to Mr. Dearle and desired him to draw an affidavit that he was present on 16th June 1752, when Robins and Whitby were married, and to swear him thereto; Dearle said he was ill, and recommended him to go to Thomas Wood, and get him to draw an affidavit; this passed in May 1754.

3. Walker Cartwright, barber.—Sunday 12th November 1752, Mr. Clements sent for deponent and bid him go the next day to Stafford to demand of Mr. John Robins two moduses for Mrs. Ann Whitby's estate, and also a marriage fee, which he said was due to him for her marriage to Robins, and said as they had been married some time he ought to be paid, and Clements then gave deponent two receipts signed by him, and the whole was of his hand-writing, and bid deponent deliver the same to Mr. Robins if he paid said two moduses, but did not give him a receipt for the marriage fee, but bid deponent give one if it was paid to him, and at same time said he expected Robins would give him more than his fee; Ann had then lived publicly with Robins as her husband, about a month; deponent went the next day; Robins paid him said two moduses and five shillings for a marriage fee, for which deponent gave him a receipt, which was written by Mr. Robins's footman and deponent signed it; same day deponent paid said money for the moduses and fee to Clements; the end of December or January 1752, Clements applied to deponent to make affidavit that deponent did not receive said

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moduses and fee for him by his order, and produced a draft of an affidavit setting forth that deponent had received said money of his own head, without the order or privity of said Clements; such draft also contained several transactions to which deponent was an entire stranger; deponent told Clements he was a very wicked man, and that deponent would not make such affidavit; Clements still pressed deponent to swear to it, and told deponent he would give him some of the sacrament money, but deponent totally rejected his offer; in January 1753 deponent made affidavit that he had received the moduses and fee by Clements' order, and he hearing of it applied to deponent to know whether he had done so; deponent told him he had; then Clements said he should have come to him, and he would have taught him what to have sworn; deponent knows Sir William's seat in Colwich church, there is no window in it.

8. Int. Respondent shaves for a penny. 16. Int. There is a window in the stair-case going to Sir William's gallery.

4. Ellen Cartwright.—In January 1753, Mr. Clements came to deponent's husband, Walter Cartwright, and asked him if he had made an affidavit that he had received of Mr. Robins two moduses and a marriage-fee for him; deponent's husband said "Yes;" Clements replied he had done wrong, he should have come to him to have been taught what to swear; there is no window in Sir William's seat in Colwich church.

4. Walter Cartwright, sen.—There is no window in Sir William's seat in Colwich church.

2. Int. Sir William has two seats below, in which there is a window. 3. Int. Sir William

built a gallery over said seat, the stairs of which are near said window. 4. Int. The south seat is Sir William's.

6. William Draper.—There is no window in Sir William's seat.

7. Ann Nevill.—The same.

8. Richard Bond.—The same.

4. Int. A writing may be signed in the window by the staircase, if a person kneels or sits down to write.

9. Francis Spencer.—The same.

10. Randolph Mottershaw.—The same.

11. Charles Trubshaw.—The same.

1. Int. As soon as one comes into Colwich church at the north door, there is a window where a person may sign a paper if he kneels or sits on the stairs.

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Witnesses for Robins on another Allegation.

1. William Lithgow.—Knows the parties; deponent was at Mr. Robins' house at Stafford from four or five o'clock in the evening of 15th June 1752 till one o'clock in the morning; deponent went there to welcome Mr. Robins to Stafford, who had not been there for some time, and to assist the servant in drawing ale for the burgesses who came there about ten or eleven of said night of 15th June as he best remembers the hour; deponent saw Mr. Robins come into his house and he then appeared to be in good health and spirits, and Richard Derry was then there; deponent observed Robins whisper to Derry, and presently after saw Mr. Robins, Derry, and William Thompson go into the little parlour; they staid there about half an hour, and then Derry directly went out of the house, and soon after Mr. Robins

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went out and did not return till near one in the morning; deponent was then there drinking; deponent saw Robins on 16th June and he then appeared to be in very good health, and able to go to Castle church.

2. Mary Bradley.— Deponent was at Mr. Robins' to serve as cook on 15th June 1752, and staid there till half past eleven that night; between ten and eleven Robins came into his house, and he then appeared to be in good health and spirits; Derry was there; deponent saw Robins whisper him and then they two and William Thompson went into the little parlour together, and staid about half an hour, and then Derry went away, and soon after Mr. Robins went out; on the 16th June deponent dressed a supper at Mr. Scott's child's christening, and Robins and Nicholls came there together; believes they were godfathers to said child, and they supped at Scott's; Robins appeared to be in good health.

3. William Marston, carpenter.— Deponent went to Mr. Robins's on 15th June 1752, to welcome him home between ten and eleven at night; Robins came in, seemed in good health, and then he and Derry and Thompson went into the parlour together.

N. B. On 3d Interrogatory, this and most of the witnesses say Mrs. Hales spoke to them to be witnesses.

4. Ann Harvey.—On 16th June 1752 Robins supped at Scott's, and appeared to be in good health and able to have gone to Castle church.

5. Ann Marson.— 16th June 1752 deponent saw Mr. Robins going alone from his own house towards Scott's house, and saw him go into said house without any assistance.

6. John Saunders.—16th June 1752 deponent saw Mr. Robins, and he appeared to be in very good health.

7. Mary Bolton.—Deponent was servant to Mrs. Whitby at her husband's death; heard his will read; he devised the guardianship of his two sons to his said wife during her widowhood only; deponent was told by Derry and others that the marriage between her and Robins was to be a secret, because she would lose the guardianship of her children, and therefore the servants were directed to speak of her as a widow; deponent believes said marriage was kept secret on account of said guardianship of her children; on the 29th August 1752, deponent was at said Ann Whitby's house, and said Ann was very ill all that day, and did not write any letter that day as deponent believes; for deponent saw her attempt to write, and she could not, her hand trembled so much.

8. Mary Nutt.—On the 15th June 1752, Robins dined with Ann at Whitby's, and he seemed to be then in very good health, and said he was come from Lord Uxbridge's, and he and Ann walked out for an hour before dinner, and he walked without assistance, and did not seem tired when he came in again; after the 16th June Ann often spoke to deponent of her marriage, but enjoined deponent to keep it secret; in said month Robins came to Anne's house, and he and she both charged deponent and Derry to keep their marriage secret; the reason they gave was because she would lose the care of her children; deponent has heard Mr. Whitby's will, by which the guardianship was given to her only during her widowhood, and therefore she was spoken of and treated as a widow; but Sir William's be-

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haviour to her obliged her to publish her marriage in October 1752, and she thereby lost the care of her children; deponent was with Ann the whole day of 29th August 1752, and is certain that Ann did not write any letter that day, but was very ill and unable to write; deponent saw her attempt to write that day upon business, but she was not able to write, her hand trembled so much (as she said), occasioned by the ill-treatment she had met with at Clements' on 26th August.

9. John Blakemore. — On 15th June 1752 Robins appeared to be in good health; deponent saw him and Ann walking both before and after dinner, and believes they walked together an hour each time, and he did not seem fatigued; he got into the chaise when he went away without any help, and Mr. Nicholls, since dead, was with him; Ann was above stairs all day of 29th August 1752, and therefore deponent did not see her that day.

10. Hannah Wright. — Deponent went to live with Ann as housekeeper on 3d April 1752, and staid with her about two years and a half; on the 29th August 1752, Ann was very ill; deponent does not believe she wrote any letter that day, for she did not seem capable of writing one; believes her illness arose from ill-treatment at Clements' on 26th August.

11. Ann Locksdale. — In the middle of June 1752, Robins was at Scott's, and appeared to be in a weak condition.

8. Int. Believes Scott's child was baptized at home on Robins' account, who could not well walk to the church.

12. John Buchannan, M. D. — Deponent was

with Robins at Nicholls's on 15th June, and he then seemed to be an invalid.

2. Int. Robins was reputed to drink hard, and he seemed to be impaired and in a feeble state; in a morning he was very weak and scarce able to hold a dish of tea. 4. Int. Dr. Wilks is a physician of great eminence. 6. Int. Believes Dr. Wilks, by talking with Robins on 16th June, might judge of his health.

13. Randolph Mottershaw. — There is no window on the right hand of the church of Colwich; on the south side there is a window in which a person sitting on the stairs might write.

14. Charles Trubshaw. — No window in Sir William's gallery.

1. Int. Same as the rest.

15. Thomas Nevill. — The same.

Read paper D. dated 9th May 1754. — "I, William Thompson, promise to declare on oath that I was present on 16th June 1752, and saw Mr. Robins and Mrs. Whitby married."

Witnesses for Sir William.

1. John Dunn. — In Sir William's old seat there was a window about four feet seven inches and upwards from the ground, and though it is not in the gallery, it is commonly called the window in Sir William's seat.

Three more witnesses to the same purpose not read.

Dr. Hay's argument for Mrs. Robins, alias Whitby. — Sir William's courtship was from June to September 1752; to his suit she pleaded in bar that she was the wife of Robins, and therefore not liable to

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answer to Sir William on a charge of adultery, but Sir William insists on his marriage with her in order to be divorced from her. That Robins was living on 23d September 1752, appears from Clements' receipts to him in November 1752. She has alleged that she was married to Robins on 16th June 1752; I shall not lay great stress on the contract, because the same witnesses prove the contract and the marriage; if there had not been a real marriage she would have rested on the contract. Mr. Robins died in 1754, the contract is of his handwriting, the marriage is a fact, and must be proved by positive evidence, and is not to be set aside by conjectures. Richard Derry's character is unimpeached; he is supported by Nutt and Bailey; they are also supported by a marriage bond and a warrant, and an entry in the parish register; their objection is, that no regard is to be paid to the register or to the witnesses; first, as to the entry—it is to be contradicted by declarations, and an affidavit of Corne to set aside his own act, his declarations also are contradictory to one another. I object even to the competency of Corne, he speaks to repeated conversations with Hickin, who is proved to be living, and yet he is not examined, and therefore Corne's affidavit &c. is not the best evidence that could have been had; it does not appear to me that the entry is on a rasure; Brooker is certain there was no rasure in the entry on 15th June 1753, and Dunn, their witness, says the same, so Corne is contradicted by two witnesses. Seckerson says Corne told him in September 1753, that he had forgot to register Ward's child. Corne died in November 1753; in December 1752, he on his canonical obedience declared to the Bishop that he had married Mrs. Whitby and Robins on 16th June;

they have admitted that Corne deserves no credit by himself, and he is supported only by William Thompson, who is clearly perjured. Thompson, upon his first examination, owns he signed the declaration marked D. ; upon his second examination he denies it, and Dearle expressly contradicts him ; their great point was to shew a marriage on 9th October 1752, between Mr. Robins and Mrs. Whitby, and this is to be proved by Corne, who was guilty of forgery, and by Thompson, who is perjured ; the declarations made by Ann and Robins that the marriage was off, shews there was a rumour of the marriage in the country ; they have not proved that Robins was not at Castle church on 16th June. Vaughan and Nicholls swear Robins did not go out of Nicholls' house on 15th June at night till between twelve and one, this is contradicted by three witnesses, who saw him at his own house with Derry about ten that night ; he dined and supped abroad on 16th June, which proves he was not very ill ; it has been attempted to impeach Derry by the evidence of Lukin and Greatholder, but they do not contradict him ; another objection is made to him that he swears he signed the declaration of 21st August by force, having been compelled to sign it by threats, whereas they say he did it voluntarily, — Victor proves he was threatened. No particular impeachment of Nutt and Bailey, they rely on two grand particulars, — her letter said to be written to Sir William on 29th August 1752, — and the marriage articles of 22nd September 1752. Victor to 4th interrogatory says, he gave a copy of his letter to Ann, to Sir William : why was it not introduced to shew the date, and why was not Sir William's butler examined, with whom Victor left his letter to be carried to Ann ? All her family

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swear that Ann was not abroad on 29th August 1752, and yet the letter supposed to be written to Sir William on that day, speaks of her going abroad that day.—As to the articles, every part of them is improbable ;—the witnesses are contradicted as to the window where they were signed ; if Cartwright and his wife can be believed, Clements is a most infamous man ; the articles import fraud, she bars herself of dower, and gives Sir William 300*l.* a-year of her jointure. Clements to 6th interrogatory, on his 2nd examination, says Ann sent him a card sealed up, to desire him to bring her the articles ; that card is not exhibited ; if she had signed articles on 23d September, that fact would not disprove positive evidence of a marriage on 16th June.

Dr. Simpson, same side.—They have not disputed the contract being in the hand-writing of Robins ; Dunn swears positively that the entry in the register appeared to him fair when he inspected it soon after 12th October 1752, and there was then no paper pinned to the register ; Corne applied to know where Ward's child was buried in September 1753, ten months after the entry had been seen fair by Brookes and Dunn, and, therefore, Corne's account of his erasing the burial of Ward's child must be false.—Affidavits have been received, where the witness has been indifferent as to the facts ; in civil actions one affidavit cannot be received as evidence. The bond from Robins to Corne, dated in December 1752, was to induce him (as he says) to alter the register,—it is a general bond to indemnify him from a clandestine marriage ; it is most likely Corne's illness arose from his affidavit ; no witness speaks to a mar-

riage on 9th October 1752, but Thompson ; Clements and Wolseley both say the articles were signed on 23d September 1752, immediately before the ceremony ; Blakemore and all her servants swear she was ill on 29th August 1752 ; notwithstanding the affection they pretend Ann had for Sir William, she, according to their suggestion, married Robins a fortnight after they pretend she married Sir William. Nutt and Derry both say, Sir William, on 27th August, insisted that he was married to her the night before, and she then insisted on having back the paper she had signed the night before ; they have not attempted to contradict any part of these facts ; the paper signed by her on 26th August was not witnessed then, and probably it was attested afterwards, and the date altered to September. Mr. Wolseley swears the articles were executed in a window on the right hand going into Colwich church from the road,—Mrs. Clements does not know what window it was done in,—Mr. Wolseley says, that he attested them afterwards at Clements' house, but yet Wolseley's name stands first in the attestation,—Mr. Wolseley varies in his account on his second examination ; the demand of modus's and a fee from Robins is strong evidence against Clements ; the witnesses to Robins' being with Derry and Thompson in his parlour on 15th June at night, are not contradicted.—Derry, to interrogatories, denies that he ever had any conversation, to the best of his remembrance, with Sir William's servants about Ann's marriage with Sir William, except that he said, if such a thing could be as her marrying Sir William, she would knock him up in a twelvemonth. Lukin knows nothing of the conversation with

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Derry, and, therefore, the case stands upon Greatholder's evidence alone.

Dr. Smalbroke, contra, for Sir William Wolseley.—I shall show she has totally failed in her plea of marriage. She pleaded courtship by Robins, from April 1751, but has not attempted to prove it, no letter has been produced from him to her; if the contract had been proved, it would have been clear evidence of prior intention to marry; the contract was not executed at the time it bears date, as is clear from circumstances. She could not have been afraid of being forced to marry Sir William, if she had been contracted to Robins; when the double marriage was discovered in October, the contract was not spoken of; Derry and Nutt, in their affidavits in the King's Bench, did not mention a contract, it was not produced till November 1755; by it, they agreed to solemnize marriage *in facie ecclesie* on or before 31st August 1752—the limiting it to that time is suspicious; Nicholls swears Robins did not stir out of her house on 15th June, till one in the morning, and she is supported by Vaughan; as Robins was with Ann on 15th June, they would certainly have settled the bond of the marriage then, if they had intended to marry the next day; the date of the marriage bond is plainly false; from his weakness and the badness of the weather, it is highly improbable that Robins should have been at Castle church on 16th June, 1752; they have not specified how Robins went to Castle church, whether on foot, on horseback, or in a carriage; he could not go on foot—he declared he had not rode on horseback for many months—if in a carriage somebody must have seen it; no proof that he or Corne were abroad that morning. Nutt says Ann told

her of her marriage on 16th June; her declarations to Mr. Whitby, to Mr. Crutchley, and to Mary Flint were voluntary. Robins disavowed this marriage, for he went to France as soon as the subsequent marriages were discovered; they did not intend a secret marriage, as appears from what is said to be their own act, for by the contract they agreed to be married *in facie ecclesiae*. The entry in the register—the licence for the marriage—all, made it public; the contract was *ipsu mmatri monium*, an actual subsequent marriage was therefore unnecessary. Corne was ten years surrogate at Litchfield; no impeachment on his general character; his affidavit was his solemn dying declaration; perfect agreement between his declarations and the proofs in the cause; Corne did not return the bond and warrant till 18th December, his first return after 9th October. Ann has pleaded, and therefore cannot deny, a rasure in the register. The fright Corne expressed to Seckerson, shows he had something of more consequence on his mind than barely the entry of the burial of Ward's child. Nicholls knew Robins was at Lord Uxbridge's on 9th October, for he dined with him there that day. The bond of indemnity is dated 23d December 1752. Michael Peak confirms Corne as to his going to Hickin; Hickin was much interested to have cleared up the charges against him. Corne never varied in his account after March 1753. Pardo was told by Corne that he had entered the marriage on 9th June, and he shewed Pardo the register,—the entry was on 16th June, and was then on a rasure. Bailey proves a couple were married in July, but does not prove the day or the parties. The Bishop of Litchfield and Mrs. Nicholls prove there was a report of a marriage between Ann and Sir William; there was

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no inconsistency in Clements' asking for the mousies and fee in case Robins was married to Ann. Cartwright and his wife cannot be believed; six witnesses proved Ann played at cards on 26th August; the conversation between Sir William and Ann after 26th August, deposed to by Nutt and Derry, is absolutely incredible; the allegation as originally drawn, only alleged that Ann did not write any letter on 29th August 1752,—the Court intimated that this would not be a sufficient plea—that she ought to allege that she was so ill, that though she attempted to write on that day she was not able to do it, and so the witnesses swore up to what they understood was necessary. There are objections to Derry and Nutt, Derry has attested a bond, which he says was executed on 15th June, but is dated 9th June; Derry says he signed his declaration by force, whereas no force was offered him. Mr. Robins has given in false and dilatory pleas.

Dr. Bettesworth, same side.—The contract is quite out of the question; the transaction with Sir William was known in the country; they pleaded that the bond was executed on 9th June, in the allegation which Ann gave in, in March 1754. Derry's account of what passed on the 15th June is improbable. Robins alighted that night at Nicholls' and did not go home till one in the morning; they have not produced Robins' letter of 15th June to Ann; there is no evidence of notice given to Corne to marry them on 16th June, impossible Robins should go in a carriage to Castle church without its being known; he was in a very bad state of health, and it was a very wet morning; grossly improbable that Bailey should be warned by Corne only to know nothing of the matter. Mrs. Nicholls swears Thompson said Robins was

in bed at eight in the morning of 16th June; I am little concerned for Thompson's evidence, it is not to be much credited, but must observe he could have no view in swearing that he did not sign the paper D. Corne's first declaration could not be true, for he told the bishop he had married them between eleven and twelve in the morning, and at first said he had married them on 9th June. Dunn upon first view did not see the rasure, but he afterwards saw it. Seckerson deposes to the end of September 1753, when Corne applied to him to learn the day when Ward's child was buried; to the second interrogatory Clements says, Ann requested him not to enter her marriage with Sir William. They have pleaded that the entry of her marriage with Robins was written on a rasure, and therefore cannot now deny that fact. Corne returned the bond and warrant into the bishop's office on 18th December 1752, the first return he made after 9th October. Derry and Nutt say Robins and Ann called them into the parlour in June, and told them they were married, and bid them keep it secret; the articles are a disavowal under her hand, of her marriage with Robins; Ann only dictated to Clements the alterations she would have made in the articles; the letter of 29th August 1752, from Ann to Sir William, shews her great liking to him; Bolton is introduced to prove Ann could not write on 29th August; Derry, Nutt and Thompson (as she says) all told her the secret of Ann's marriage to Robins; we could not examine Hickin, because he is charged by us with subornation of perjury.

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Dr. Hay's reply.—Four witnesses must be adjudged to be perjured if sentence is given against Ann's marriage with Robins; if Robins was married

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to Ann on 9th October, it would follow that he could not have been married to her on 16th June 1752; but they have not proved a marriage on 9th October; Corne was guilty of forgery, and therefore cannot be received as a witness; Clements' character is strongly affected by Cartwright and his wife,—the letter of 29th August is proved only by Victor. Why did not they interrogate Derry as to the manner in which Robins came to Castle church? if the fact of Mrs. Robins releasing her jointure to Sir William had been proved, it would have been an evidence that she was married to Robins.

Dr. Simpson's reply on same side. — The fact which alone was material for them, was to have proved that Robins and Ann were married on 9th October 1752, which they have not proved; it is not likely Ann and Robins should desire Corne to alter the register which was fair. Corne told the bishop that the marriage was to have been on 9th June, but Robins sent him word it could not be that day, and therefore the bond and warrant were prepared and dated on 9th June; Mr. Robins made no declarations, relative to the marriage, till after 16th June.

JUDGMENT—SIR GEORGE LEE.

Though there were objections to the witnesses on both sides, I was of opinion that the weight of the evidence was in favour of the marriage on 16th June 1752. Derry and Nutt had deposed to conversations between Ann and Sir William, which seemed improbable, but their general characters were unimpeached, and witnesses against whose general characters there was no exception, were not to be rejected upon conjectures, suspicions, and

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supposed improbabilities only. Derry had sworn positively that he was present, and saw Mr. Robins and Mrs. Whitby married on 16th June, and his name appears as a witness to the marriage bond,—Nutt has sworn positively that Mrs. Whitby told her on 15th June, that she was to be married to Mr. Robins the next morning,—that Whitby went out very early the next morning, and when she returned home, told her she was married to Robins, and they were supported by Bailey, against whom there is no exception whatsoever ; and also by Seckerson, who swears Corne told him in June 1752, that he had married a couple of fortune that month, and he should have his fee as clerk of the parish, but the marriage was not at that time owned,—and that in October following Corne told him the couple he had mentioned to him to have been married in June as aforesaid, were Mr. Robins and Mrs. Whitby — an *alibi* of neither of the parties was proved, for though it had been attempted to prove that Mr. Robins was unable to go to Castle church on 16th June, yet the proof was deficient, for he had travelled several miles on the 15th June, supped abroad that night, and dined and supped abroad on 16th June, and there was no proof that he had not been out of his house the morning of 16th June ; on the contrary, William Thompson, who was the principal witness for Sir William, was so grossly perjured in this cause, that no credit in law could be given to any thing he deposed, so that the fact that Robins and Whitby were married on 9th October 1752, and not before, rested solely on the declarations and affidavit of Corne, which, as he was dead, I was of opinion would be good administricular proof to support other witnesses, but was not of itself sufficient evidence to support facts contrary to his own acts, not

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only as his evidence was *ex parte*, but also as he appeared to have acted very improperly, for if he had erased the register and made a false entry, he was guilty of a sort of forgery, and if he had not done so, he was guilty of perjury, and therefore I could not consider his affidavit and declarations, standing unsupported, as any evidence at all. As to the letter from Ann to Sir William, said to be written on 29th August, I did not think that point was proved, for though Victor swears he wrote to Ann on 29th August, and that he never wrote any other letter to her, and she, in her letter to Sir William, says she had that morning received a letter from Victor, yet it does not appear that Sir William's butler, with whom Victor left his letter, delivered it to Ann that day, and consequently the date of her letter is not fixed to be on 29th August; on the contrary I must believe she did not write it on 29th August, because three or four witnesses have positively sworn she was so ill on that day and her hand trembled so much, that though she attempted to write, she was utterly unable to do it, and that she was not abroad that day, though in the letter she mentions she was going abroad.—As to her giving encouragement to Sir William, and signing marriage articles, it was not more extraordinary than the rest of her conduct, for it was not more improbable that she should marry Mr. Robins on 16th June, and afterwards marry Sir William on 23d September, than it was that she should marry Sir William on the 23d September, and marry Mr. Robins on the 9th October following, which Sir William had alleged, and attempted to prove she had done; and therefore, upon the whole, I pronounced by interlocutory, that from the proofs in the cause, it appeared to me, that Mrs. Ann Whity was married to Mr. John Robins on 16th June.

1752, who was living on the 23d September 1752, and therefore I admitted her plea in bar, and dismissed her from Sir William Wolseley's suit, but without costs.

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Sir William's proctor appealed. (a)

PREROGATIVE COURT OF CANTERBURY.

HASELFOOT *against* HASELFOOT.

Vezey Haselfoot died intestate in November 1756 ; left three children and three grandchildren ; caveat was entered by Harvey, who married deceased's daughter, in behalf of his children by her.

4th Session
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An inventory
decreed.

(a) The judges delegates named in this commission were —

Edward Earl of Warwick and Holland, John Lord Bishop of Salisbury, James Lord Bishop of Gloucester, John Lord Bishop of Bristol, Hugh Lord Willoughby of Parham, John Lord Berkeley of Stratton, Mr. Justice Denison, Mr. Justice Clive, Mr. Baron Legge, Sir Thomas Saulsbury, and Drs. Walker, Collier, Ducarel, and Clarke.

They accepted the commission on the 24th December 1757, and the cause was proceeded in, under the title of " Sir William Wolseley of Wolseley, in the county of Stafford, Bart., the lawful husband of Dame Ann Wolseley, falsely calling herself Robins *v.* the said Dame Ann Wolseley, falsely calling herself Robins," for a considerable time, but never came to a hearing, for on the 1st February 1759, the proctor of Sir William Wolseley exhibited a special proxy under the hand and seal of his party, by which he renounced the appeal ; whereupon the condelegates assigned the cause for sentence before the whole commission, and on the 3d July 1759, the Court, by its final decree, pronounced against the appeal, and remitted the cause to the Arches Court.

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Mr. Farrer, Harvey's proctor, prayed, and it not being opposed, the Court decreed a commission of appraisement, but afterwards Farrer subducted his prayer, and did not take out the commission; then administration was granted in February 1757, to William, deceased's eldest son, and Thomas, another son, and all the rest of the relations entitled to distribution agreed in writing that the effects should be appraised by friends therein named, who accordingly appraised them, notwithstanding which, Thomas cited William to exhibit an inventory and account, and to give further security, and upon the return of the process prayed a commission of appraisement, which William opposed, but declared he was ready to exhibit an inventory.

I rejected Thomas's prayer, and decreed William to give in an inventory.

December 8.

CUNNINGHAM *against* Ross.

A will not attested by witnesses holden to be entitled to probate.

Administration cum testamento annexo decreed to the universal legatee, she having first proved herself to have been the widow of the testator.

Dr. Bettsworth for Elizabeth Cooper, *alias* Smith, *alias* Cunningham. — David Cunningham died in October 1755; on 8th July 1752 he made his will all in his own handwriting in these words: —

“ *I, Master David Cunningham, doctor in medicine, do hereby give, grant, bequeath to Mrs. Elizabeth Cooper, alias Smith, out of love and affection, all my bonds, bills, ready money and goods belonging to me, lying in the lodgings I possess in the house belonging to Mr. Smith the trunkmaker near Charing-Cross, and that none of my relations shall trouble or molest her in any manner of way, but after her decease to bestow on them according to her* ”

pleasure; this I do in soundness of body and mind. PREROGATIVE
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Signed by me the 8th of July 1752. I say by me,
Witness, DAVID CUNNINGHAM.
Andrew Nash, Amen. Michaelmas
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Margaret Smith.

The witnesses wrote their names by mistake on the will as persons who could prove his handwriting, for the will was not executed by deceased in presence of witnesses. Elizabeth Cooper lived with him as his housekeeper and companion, on the 9th February 1754, he being a very old man, married her, who was not young; on deceased's death she applied, as widow and universal legatee, for administration *cum testamento annexo*. Caveat was entered by Cheslyn for Robert Ross, deceased's nephew and next of kin; Hughes, her proctor, denied Ross's interest, and Cheslyn denied her interest and opposed the will. First session Easter Term 1756, Cheslyn propounded Ross's interest, she then confessed it, and paid costs. Second session Trinity Term 1756, Smith, now proctor for her, pleaded her interest and the will in separate allegations. Cheslyn, in Hilary Term 1757, gave in an allegation, and has examined witnesses; he afterwards offered another allegation, which was rejected. Two questions; 1st, whether she had proved her marriage; 2d, whether she has proved the will. Ross has pleaded nothing to affect the will, but we have fully proved it to be the deceased's handwriting. They were married at Keith's chapel, the parson proves that he married two persons of their names, Drummond, the clerk, proves their identity, the deceased confessed the marriage; they have attempted to prove she lived with him only as a servant, and had been mistress to, and had children by, one

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James Smith, but have not proved she passed for Smith's wife ; they have indeed exhibited an entry of the baptism of a child as the son of James and Elizabeth Smith.

Dr. Hay for Robert Ross. — Deceased had no effects at Smith's house when he died, for he was removed from thence and lived in Cranbourn-Alley ; the paper is imperfect ; there is no declaration prior or subsequent ; two witnesses to the marriage ; we have proved her to be an infamous woman ; courtship pleaded but not proved.

Witnesses for Cunningham on the will.

1. John Johnson, Esq. æt. 24. — Deponent well knew deceased ; has often seen him write ; well knows his handwriting ; the will is all of his writing.

1. Int. Never knew producent called by any names but Smith and Cunningham, and all the time deponent knew her she lived with deceased, but cannot say whether as a servant or not. 2. Int. Has heard she was married to or kept company with one Smith. 3. Int. Believes she went by name of Smith in deceased's lifetime ; cannot tell whether she claimed to be married to him till after his death or not. 4. Int. Deceased was about eighty-three years old at his death. 23. Int. Producent some time ago gave deponent's wife a handkerchief, which she said she would be paid for, if she lost her cause.

2. Thomas Calloway, gent. — Deposes to the handwriting of deceased ; came to know him by knowing producent ; never saw deceased write, but has received letters from him ; believes the will is deceased's writing.

1. Int. Knows nothing of producent being a

loose woman. 2. Int. Producent had a child by Smith, and went by name of Smith, but she passed for deceased's wife some time before his death.

21. & 22. Int. Does not know that Smith and producent ever owned each other as husband and wife.

3. John Mackintosh, merchant. — Knew deceased ; has seen him write his name, but not often ; believes the name subscribed to the will is his writing.

1. Int. Believes producent has gone by the names of Cooper, Smith, and Cunningham.

4. John Vaughan, upholster. — Knew deceased well ; knows his handwriting ; believes the will is deceased's handwriting ; believes deceased had no personal estate but what is contained in the will.

Int. Believes producent had children by Smith, which said Smith owned to deponent, and believes she went by his name, and was reputed his wife.

5. Andrew Nash. — Fully proves the will to be deceased's handwriting ; proves producent's identity ; deponent and Margaret Smith subscribed their names to the will inadvertently after deceased's death, only thereby to signify they knew and could prove his handwriting.

Witnesses for Cunningham as to the marriage.

1. Brewer Kidman, clerk. — Deponent is a priest of the church of England, and officiated at Keith's chapel ; on the 9th February 1754, a man who said his name was David Cunningham, and who deponent has seen, came to his fellow-witness James Drummond, and a woman who went by the name of Elizabeth Cooper, who deponent did not know, but believes was producent, came to said chapel to be married, and

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described themselves of St. Martin's parish, and deponent then married them together according to the liturgy of the church of England.

6. Int. The man the respondent married was a tall, personable man, but respondent does not know his complexion, or age.

2. James Drummond, gent. — Deponent knew deceased thirteen or fourteen years before and to his death ; deponent officiated ten years as clerk at May-fair chapel ; deceased often called on deponent there ; deponent first knew producent six or seven months before her marriage ; on the 9th February 1754, about eleven in the morning, deceased and producent came to May-fair chapel, and they were then and there married together by Mr. Kidman according to the liturgy of the church of England, in presence of deponent, who officiated as clerk and gave her in marriage to deceased ; believes they, from that time cohabited as husband and wife, and they owned each other as such, and were so reputed to be.

6. Int. Deceased was a fair, middle-sized man ; respondent took him to be about seventy years old.

3. Gilbert Sheldon.—Deponent knew deceased about two years before his death ; deponent heard it reported that deceased was married to his housekeeper, who deponent knew, and deceased and producent came together to deponent's house ; deponent told them he heard they were married together ; deceased replied "I am," or "She is my wife," or to that effect ; deponent wished them joy and saluted the producent ; from that time deponent esteemed them to be man and wife.

Int. Never knew her go by any name but Smith, and Cunningham, which last name she was called by in deceased's lifetime.

4. Andrew Nash, tailor. — Producent is an anabaptist, and it being reported she was married to deceased, deponent and Thomas Sturgis were appointed by the assembly to go to her and inquire into the truth of her marriage; some time between Midsummer and Michaelmas 1755, deponent and the said Sturgis went to the house of Mr. Smith at Charing-cross, where deceased and producent lodged, and went into the room where they were together, and Sturgis asked producent whether she was married to deceased; she bid him ask deceased, and thereupon deceased said she (meaning producent) is Mrs. Cunningham; Sturgis asked why they kept it secret; deceased answered they had reasons, and mentioned his age, and said they should be laughed at.

PREROGATIVE COURT.

Michaelmas
Term,
December 3.

1. Int. Producent acted as deceased's servant to his death. 2. Int. Respondent subscribed his name to the will, but not at the request of any one. 4. Int. Respondent knew James Smith, who kept a school at Brentford; producent owned to the assembly she had lived with Smith, but was not his wife. 8. & 9. Int. Deceased removed to Cranbourn-Alley, where he died; believes he had no effects at Mr. Smith's at Charing-cross at his death; respondent owed deceased forty pounds, and respondent is a bankrupt. 14. Int. Respondent shall not gain or lose by this cause.

5. Thomas Sturgis, apothecary. — Knew deceased and producent; deponent and Andrew Nash went to them to enquire into the truth of their marriage; upon Nash's enquiring, deceased told them they were married at May-Fair chapel, and she produced a certificate of said marriage.

1. Int. Has heard producent at one time did

PREROGATIVE COURT. all deceased's work, but after their marriage they kept a servant girl.

Michaelmas

Town,

December 8.

Witnesses for Ross.

1. Ann Panton. — Knew deceased; often visited him at Smith's house at Charing-Cross; deceased was about eighty-five years old; deponent knew Elizabeth Smith, who acted as his servant and is aged about forty; never heard she went by any name but Smith, till after deceased's death.

2. Edward Smith. — Deceased lodged at deponent's house; and Elizabeth Smith lived with deceased about three years at deponent's house as his servant, as deponent imagined; deceased was upwards of eighty and she about fifty; she, all the said time, went by the name of Smith, but deponent afterwards heard that deceased owned her for his wife.

3. Margaret Weems. — Deponent knew deceased about thirty years; visited him at Charing-cross; Elizabeth Cooper lived with him as a servant; believes he died a widower; Smith, *alias* Cooper, is a likely young woman.

4. William Montgomery, merchant. — Believes deceased died a widower upwards of eighty; James Smith carried deponent to his lodgings to see what a fine boy he had got, and said Smith shewed deponent a child which he owned he had by the woman then in bed in the room they were in, which woman was Elizabeth Cooper, and she and said Smith lived together as man and wife, and deponent looked on them to be lawful husband and wife, but never heard them own each other as such, or knows that they were ever so

reputed to be; deponent always thought she PREROGATIVE
COURT. lived as a servant with deceased, and she always in his lifetime was called Smith.

Michaelmas
Term,
December 2.

5. Sussanna Atkinson. — Deponent was related to and knew deceased; in January 1754 deponent went to see deceased, and several times after and at all times Elizabeth Smith appeared as his servant, and went by the name of Smith, and deponent never heard she went by any other name till after deceased's death.

6. Mary Oxenham. — Deponent knew deceased and Elizabeth Smith about two years before he died, by going to live as a servant with deceased; deponent lived with him about four months, during which time said Smith lived with deceased as his housekeeper, and he constantly called her by name of Smith.

7. Thomas Caigow. — Deponent first knew deceased about fifteen years ago; knew Elizabeth Smith by seeing her at deceased's lodgings; about three weeks before his death, deceased being in deponent's shop and speaking of said Elizabeth Smith, called her his housekeeper, and did not mention her as his wife; deceased was about eighty-five years old; Smith passed for deceased's servant, and was commonly reputed to be the wife of one Smith; never heard she took deceased's name till after his death.

8. John Herring. — Proves entry of the baptism of a child as the son of James and Elizabeth Smith.

Dr. Bettsworth for Cunningham. — No proof of affection for Ross or any other relation; the will is imperfect for want of execution, but it was

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Michaelmas
Term,
December 3.

once his intention ; no departure from it ; Ross has not pleaded any thing to impeach the will ; as to the marriage, no imputation on her but with respect to an affair with one man. She never cohabited with reputation with James Smith ; after deceased's marriage he kept another servant. Pray costs.

Dr. Harris, same side. — She is not proved to be a woman of bad character. *Swinb.* part 4, ch. 18. The stile of the will shews it is genuine. Pray costs.

Dr. Hay, for Ross. — Not necessary for next of kin to prove affection ; the Court has in no case given costs unless the next of kin were privy to the will ; they must shew a permanency of intention where the paper is imperfect for want of execution.

Dr. Smallbroke, same side. — Prerogative, *Barnesley against Powell*, a long will forged, therefore proof of handwriting alone is not sufficient proof to establish a will. Johnson is an interested witness. Prerogative, *Crellins against Jones*, a witness rejected because she had a legacy in a will of an old gown, which she had neither received nor renounced.

JUDGMENT — SIR GEORGE LEE.

I was of opinion the will was sufficiently proved, for it was fully proved to be all written and signed by the testator ; and as it was complete as to the disposition, and only contained personal estate, the law did not require execution before witnesses ;

and as to the marriage, it was fully proved by two witnesses, who were present, and by the mutual ownings of both the parties. I therefore pronounced for the will and the marriage, and decreed administration *cum testamento* to Elizabeth Cunningham, as widow of the deceased and universal legatee in his will, but did not give costs.

PREROGATIVE COURT.

Michaelmas Term,
December 3.

Cook *against* Cowper (a).

December 3.

The wife, Susanna Cook, would not give a proxy nor appear. I therefore admitted a proxy from her husband alone; and he having confessed the allegation, inventory, and account *modo et forma*, as exhibited by Mrs. Cowper, the administratrix, I decreed distribution accordingly to the husband without taking notice of the wife.

Where a party refuses to admit a proxy or to appear, the Court will proceed in the cause as if the party had appeared and raised no opposition.

MILL, Executrix of BLANDFORD, *against*
BLANDFORD.

By Day after
Michaelmas
Term,
December 10.

Thomas Blandford made his will dated 11th August 1755; appointed his wife Elizabeth Blandford, executrix, and residuary legatee, and gave his mother, Mary Blandford, one hundred pounds, but that legacy is struck out, and made Mr. Toke and Mr. James Mill, his brother in law, trustees; deceased being ill, went for air to said Mr. Mill's house at Salisbury, and there on

A will established upon adequate proof of instructions, and capacity.

(a) *Vide supra*, p. 388.; *et infra*, p. 504.

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**By Day after
Michaelmas
Term,
December 10.**

25th of August 1755, the day he died, he made another will, appointed Toke and Mill executors in trust, and gave them ten pounds each, then appointed his wife sole executrix and residuary legatee, and gave therein a legacy of seventy pounds to his mother ; she survived the testator, made her will, and appointed Beata Mill sole executrix. Mill cited Elizabeth Blandford, deceased's widow, to take probate of the last will, dated 25th August 1755. She appeared, and upon an affidavit of scripts and scrolls brought in both wills, and declared she was ready to take probate of the will dated 11th August 1755, but opposed the last will dated 25th August 1755. Beata Mill, as executrix of Mary Blandford, the mother of deceased and a legatee in his will, propounded the will of 25th August 1755 ; the widow did not propound the first will or give in any plea in opposition to the last, but cross-examined Mill's witnesses.

Witnesses for Mill.

1. Robert Stillingfleet, N. P.—Deponent knew deceased by sight for twenty years ; on or about 25th August 1755, deponent being sent for, went to deceased at the house of James Mill, his brother in law, in Salisbury, and then deceased himself gave deponent verbal instructions for making his will ; deponent wrote them down and carried them home, and directly wrote the will dated 25th August 1755, and carried it to deceased, and read it twice over to him, and asked him if he was satisfied with it ; he answered he was well satisfied with it, and should not have been easy if he had not done it ; deceased then duly executed it in presence of deponent and James Hord ;

deceased was then very weak, but of sound ^{PARROCATIV⁸} mind.

2. Int. Deceased died the same day the will was executed ; deponent heard the bell toll for him about four or five hours after. 3. Int. Deceased entirely gave the instructions for the will, and he gave them to respondent between nine and eleven in the morning. 5. Int. The will was executed between two and four in the afternoon. 6. Int. Does not remember that any one but James Mill was present at reading the will ; while respondent was reading it deceased said, " Brother, raise me a little higher," speaking to Mill. 7. Int. When the will was executed, deceased was very weak and was assisted in writing his name by Mill, who respondent believes held his hand. 8. Int. Believes Mr. Toke was in the house at the time the will was executed, but deceased said he would not have him for a witness.

By Day after
Michaelmas
Term,
December 10.

2. James Hord, victualler. — Deponent knew deceased by sight ; on 25th August 1755, as deponent believes the day was, James Mill called deponent to his house and carried deponent to a bed chamber, where deceased was sitting up in his bed, and Robert Stillingfleet was then finishing the will ; deceased asked Mill who deponent was ; Mill told him deponent was a neighbour who was come to witness the will ; Stillingfleet directed him, and deceased did execute it ; deponent cannot say whether deceased was or was not in his senses as he was very near death ; deponent signed the will as a witness.

5. Int. It was executed in the afternoon. 7. Int. Deceased was in a weak state, but was able to sit up and write his name without assistance ; respondent heard he died soon after.

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By Day after
Michaelmas
Term,
December 10.

JUDGMENT — SIR GEORGE LEE.

I was of opinion that the deceased's capacity,—his giving instructions himself for his will,—his approbation and execution of it,—were sufficiently proved by these witnesses, and the more especially as Robert Stillingfleet was a sworn notary; and therefore I pronounced for the will dated 25th August 1755, and decreed probate to the widow and executrix Elizabeth Blandford.

1758.

SEROCOLD and HUNTER *against* HEMMING.

2d Session
Hilary Term,
January 81.

A codicil may
revive a first
will by a direct
reference to the
instrument, and
revoke by im-
plication the
will in exist-
ence of the
latest date.

It is not the
act of revival
that revokes the
last will, but the
first will after it
is revived.

Wills made
in the West In-
dies are not
within the sta-
tute of frauds.

Dr Simpson for Serocold and Hunter.—Richard Heming, Esq. made his will in London, dated 23d January 1753, attested by three witnesses, and appointed Mr. Hunter, Mr. Serocold, Mr. Samuel Heming his brother, Mr. Whitehorn, Mr. Tucker, Mr. Clark, and Mr. Samuel Heming his eldest son, executors. On the 7th March 1753, deceased made another will at Jamaica, which he left behind him there when he returned to England, where he died; the last will was attested by five witnesses, and therein he appointed Mr. Rose Fuller a new executor, and left out Mr. Whitehorn and his brother Samuel Heming, but the rest of the executors were the same as in the first will. By the will of 23d January 1753, deceased charged all his debts, legacies and annuities upon his real and personal estate, gave to his two younger sons four thousand pounds sterling each charged upon his real and personal estate, and to be paid

them at their ages of twenty-one years, and added, PREROGATIVE COURT.
"It is my will and mind that if they or either of them should die under age, his share shall lapse to my estate for the benefit of my eldest son." This clause is omitted in the last will ; he gave legacies to his daughters, with clauses of lapse in like manner ; to Margaret Hawksworth five pounds a-year, which in the last will is made twenty pounds a-year ; all his plantations in Jamaica and his real estate in Britain or elsewhere, and his personal estate, subject to his debts, legacies and annuities, to his eldest son. In the last will he manumitted two of his slaves, and gave them fifteen pounds a-year each for life ; these were the only, or at least the most material variations, between the two wills. At the bottom of the first will (which he kept uncancelled), immediately under his name and seal affixed to the last sheet, he wrote with his own hand thus :

"London, 16th October, 1755 ; I likewise give to Mrs. Lucretia Luxford twenty-five pounds a-year for her life, and to my black servant, Peter Saville, ten pounds a-year for his life, the said annuities to be paid out of my estate by my executors above named : Witness my hand, RICHARD HEMING.— Witness : John Serocold ; J. Straw."

N.B. The said Serocold the witness was one of the executors in both wills.

On the 3d November, 1755, probate was granted of this will with the said codicil at the bottom thereof, to Mr. Serocold in the Prerogative office, and on the 10th of said month probate was granted thereof to Mr. Orby Hunter, another of the executors ; Mr. Clark took probate of the last will

Hilary Term,
January 31.

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—
Military Term,
January 81.

dated 7th March, 1753, at Jamaica, and sent over to the other executors an authentic copy; upon receipt thereof, Mr. Hunter and Mr. Serocold came to the Prerogative Office, and offered to bring in the probate of the first will and the codicil, and to take a new probate of the last will and said codicil of 16th October, 1755. Mr. Samuel Heming, deceased's eldest son, and an executor in both wills, entered a caveat, and prayed that the probate of the first will, with the codicil of 16th October, 1755, might be confirmed, and insisted that the codicil of 16th October revived the will of 23d January, 1753, and, consequently, that the latter will of the 7th March, 1753, was revoked. The parties agreed the facts in an act, and the point was brought on to hearing upon an act of court only, which was read, and the two wills; and Dr. Hay, who was counsel for Heming, admitted that Dr. Simpson had fairly stated all the facts in his opening.

Dr. Simpson's argument for Serocold and Hunter.—The single question is, whether the first will is revived by the codicil of 16th October, 1755; a revival of the first will be a revocation of the second will; where a will is revoked by operation of law, a parol reviver will be sufficient; but where both the wills are in being, there must be an act done to revive or republish the first will. If a will is cancelled, it must be revived by an express act. *Lewis and Watts (a), Delegates, 1738.*

(a) *Lewis v. Watts*, Deleg. 9th Feb. 1738. The Judges Delegates present were — Mr. Justice Fortescue, Mr. Justice Thompson, Sir Henry Penrice, Sir Edward Isham, Dr. Walker and Dr. Foulkes.

Cotton's case, (a) in *Vernon*, was denied to be law. *Lewis* and *Bulkley*, Delegates. The memorandum of 16th October is not styled a codicil, does not confirm the will of 23d January, does not express an intention to revive that will; testator's intention is the grand rule; it does not appear that testator intended to revive the whole of the first will. There is a flat objection, viz. that both the wills dispose real as well as personal estate, and, therefore, the last will attested by five witnesses cannot be revoked by the memorandum, which is only attested by two witnesses, and one of them is an executor, who could not depose to it. Perhaps it will be said the statute of frauds does not extend to the plantations; but in these wills mention is made of lands in Great Britain.

PREROGATIVE COURT.

Hilary Term,
January 31.

Dr. Smalbroke, same side.—If the testator has revived the first will, the second is revoked. *Prerog. Helyar and Helyar* (b).

Dr. Hay, contra, for *Heming*.—We pray that probate of the first will and the codicil may be confirmed to the executors; they pray that probate of the last will with the codicil may be granted to the executors, and that the probate which has been granted may be revoked. *Swinburn* says, that parol alone will revoke a former will. *Crok. Eliz.* 493, *Beckford* and *Farnicott*. Deceased had the first will in view when he wrote the memorandum at the bottom of it; he left the last will in *Jamaica*; the memorandum begins “*I likewise give*,” which are words of reference to the will written over them; the words

PREROGATIVE COURT. — **Hilary Term, January 31.** “ my executors,” above named, must mean the executors in the will written above. *Prerog. Friend and Burgoyne.* The statute of frauds does not extend to implied revocations; determined so at the Council Board.

Dr. Bettesworth, same side.—Deceased could not intend that the memorandum of 16th October should operate as a codicil to the last will, to which it has no reference, and it does not appear to have been under his consideration. *Hoyle against Clark*, 3 Mod. 218. *Roll's Abridgement*, 213. *French's case*, 2 Vern. 116. *Strode against Russell, Comyn*, 381.

JUDGMENT—SIR GEORGE LEE.

I was of opinion that the first will was revived by the codicil, and consequently that the last will was thereby revoked. “ *The executors above named*” could be only those appointed by the first will, and yet, unless the first will was established, as the executors were not recited by name in the codicil, such of them as were appointed only by the first will could not act even with respect to the codicil, for they were not executors if the first will continued revoked, and, therefore, this was such a reference to the first will as would revive it at least as to the personal estate, which alone was in question in this court; and if the first will was revived, that would revoke the last will; and as to personal estate, a proper act done under a man's hand only without three witnesses, would be sufficient to revive a will that had been revoked, and, therefore, I had no occasion to consider the statute of frauds upon this point, it being a case that did not fall within that statute, and which besides had often

been held at the Council Board not to extend to the plantations; but supposing the wills had related to real estate only, it might well be made a question whether it was necessary that the act of revival should be attested by three witnesses, for revivals are not mentioned in the statute of frauds, and it is not the act of revival that revokes the last will, but it is the first will after it is revived that revokes it, and that first will being attested by three witnesses, seems to satisfy the intention of the statute. Upon the whole, I pronounced that the first will was revived by the codicil of 16th October 1755, and confirmed the probate of said first will and codicil heretofore granted to Mr. Serocold and Mr. Hunter, two of the executors named in the first will.

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Hilary Term,
January 31.

RAYMOND *against* THE BARON VON WATTEVILLE.

3d Session
Hilary Term,
February 7.

Dr. Bettesworth for Von Watteville.—Dinah de Laris, *alias* Von Larish, formerly Raymond, died a widow at Hernhutt in Germany, on 25th May 1756; made her will on 26th April 1756, and appointed Baron Von Watteville her universal heir or executor. She resided at time at Hernhutt, in Upper Lusatia. Pursuant to the laws of that country, in the court or before the magistrates of Hernhutt, she recognized her will the day of the date thereof, and deposited it in the said court on 9th August 1756. Baron Von Watteville took probate in the Prerogative Court

When a certificate to a decree for answers has been discontinued, it is still competent to the proctor having discontinued it, to object to answers.

Answers directed to be reformed.

A new requisition allowed to issue to Germany.

PREROGATIVE
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Hilary Term,
February 7.

of an authentic copy of said will, as executor therein named. In the 1st Session Michaelmas 1756, Jones Raymond, Esq., brother and one of the next of kin to deceased, cited him to propound and prove the will by witnesses, or shew cause why administration should not be granted to him as one of the next of kin. On the 2d Session of Michaelmas Term, Fountain appeared for Watteville, and brought in the probate. On the 4th Session he confessed Crespigny's interest, who appeared for Raymond. On the by-day, Crespigny opposed and Fountain propounded the will, and prayed decree against the other next of kin ; and Crespigny prayed that Fountain might be assigned to bring in the original will ; on the 4th Session Hilary Term 1757, Crespigny's petition was rejected, and Fountain's allegation propounding the copy was admitted, and he immediately prayed a commission to examine witnesses to be directed to the magistrates of Budissin, in Germany, without staying for Raymond's answer ; but at Crespigny's desire the requisition for examining witnesses did not issue under seal till the 24th March 1757, and was made returnable 1st Session Trinity 1757. In the 4th Session Easter, the answers not yet being given in, Fountain prayed a new requisition, being apprehensive the first would not be returned in time ; the second requisition did not issue till the 25th August 1757, returnable 1st Session Michaelmas. On the 2d Session Trinity Term 1757, the decree for was answers returned, but no appearance given to it till the 4th Session Trinity, and then Crespigny was assigned to give them in on 28th July following, but the assignation was continued on till the 3d Session Michaelmas, 23d November 1757, when they were given in ; the

requisition has been continued on to this time. PREROGATIVE COURT.
In the 1st Session of this Hilary Term, Fountain objected to the answers; we are now upon fuller answers, and we pray a new requisition, presuming that the former, which has not been returned, was not executed on account of the war in Germany.

Hilary Term,
February 7.

Dr. Hay, for Raymond. — Deceased, who died a widow at Hernhutt 25th May 1756, left Jones Raymond, Esq. her brother, and Mrs. Burrell and Mrs. Glanville her sisters and only next of kin. Raymond cited Watteville to prove the will; Watteville's allegation pleading a copy of said will was admitted on 25th February 1757, and a requisition for examining witnesses, and another for an inventory, were then decreed to the magistrates of Budissen; the last of them is returned, but the inventory is not full. Raymond's answers were given in on the 23d November 1757, and Fountain was to prove on the 23d January 1758; upon that day he prayed fuller answers, but the certificate of the decree for answers having been discontinued from 23d November, he cannot now object to the answers; he prays a new requisition; there is no satisfaction given to the Court that the former requisition has not been executed.

Per Curiam.

It being a matter of practice, I asked the opinion of the registrar and proctors, whether Fountain, having discontinued the certificate of the decree for answers, could now object to the answers as not full? And they being of opinion that by practice he might, and saying that it was

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**Hilary Term,
February 7.**

common to discontinue the certificate after an appearance had been given to the decree, I allowed his counsel to object to the answers.

Allegation. 1st Article pleads factum of the will, and capacity.

2d Article. Deceased lived at Hernhutt and recognized her will before the judge and officers of Hernhutt, and she deposited it with them in the Court.

3d Article. She died on 25th May 1756, and then the officers of the Court secured her effects.

4th Article. Baron Von Watteville took on him the execution of the will, and the Court then delivered to him two authentic copies of the will.

5th Article. The copy propounded is an authentic copy of the deceased's will remaining in the Court at Hernhutt.

Answers to the 1st, 2d, 3d, 4th and 5th Articles.

Deceased was a natural-born subject of England, and a widow; deponent and his sisters are her only next of kin, for whom she had great affection. Deceased became an Hernhutter, and went to Germany; respondent has not seen the original will, and cannot answer to it, but believes it was not signed by her, because her maiden name, Raymond, is not rightly subscribed to it; Watteville is an Hernhutter; gives a long account of them and says they are a wicked sect, and that they have erected courts by their own authority contrary to law, and that no faith is to be given to the acts of their courts, as being absolutely under the command of Count Zinzendorf, and his son-in-law, Baron Von Watteville.

Dr. Bettesworth objected to all that part of the answer, in which the Hernhutters and their tenets were abused, as foreign to the cause, and containing scandalous matter, and also to that part which suggested affection to her relations, because there was nothing in the plea to lead thereto.

PREROGATIVE COURT.

Hilary Term,
February 7.

JUDGMENT—SIR GEORGE LEE.

I was of opinion that affection to her relations might be properly suggested as a reason for his believing it was not the deceased's will ; but I ordered the abusive matter to be struck out as foreign to the cause and improper, and condemned Raymond in 13*s. 4d.* costs, according to style, and ordered him to give in other answers, and declared that, considering the present state of things in Germany, I would grant a new requisition, and assign a new term probatory as soon as the answers were brought in.

MERCER against MORLAND.

4th Session
Hilary Term,
February 18.

Dr. Bettesworth, for Thomas Mercer.—Edward Mercer died a widower, intestate, without children or parents ; left William Mercer a brother of the whole-blood, and Thomas and John Mercer brothers of the half-blood, his only next of kin. William Morland a creditor, entered caveat, which was warned, and then Smart appeared for William Mercer and alleged he was duly sworn administrator, and exhibited an inventory and prayed ad-

Where administration is contested by two persons of the whole blood in equal degrees of relationship, the rule is to grant it to the one who unites the majority of interests.

But where the contest is between one of the whole-blood

and one of the half-blood, the one of whole-blood is to be preferred,

**PREROGATIVE
COURT.**

**February Term,
February 18.**

ministration to be granted to him. Smith appeared for Thomas Mercer, and alleged him to be a brother to the deceased by the half-blood. Interests on both sides were confessed, and the court assigned on grant of the administration ; John Mercer, the other brother of the half-blood, by his proxy prays the administration may be granted to Thomas, and Morland, a creditor by note in 80*l.*, joins in the same prayer. The inventory amounts only to 230*l.* or thereabouts. Thomas and John Mercer are entitled to two-thirds of the clear effects

Dr. Hay, for William Mercer.—Deceased died on the 4th January, 1758 ; William was sworn administrator and gave security in 500*l.*, but the administration has not been yet decreed ; it has been usual to grant it *primo petenti* when the relationship is equal ; the securities have justified.

JUDGMENT—SIR GEORGE LEE.

I declared, that when the contest for an administration was between two persons in equal degree of the whole blood, (a) the general rule had been to grant it to that person in whom the majority of those entitled to distribution concurred ; but that rule did not hold when the contest was between one of the whole-blood and one of the half-blood, for in that case the whole-blood was preferable in the grant of administration to the half-blood, though the majority of interest concurred in the latter, unless material objections could be proved against him of the whole-blood ; and so it was held in the case of *Webb and Griffin*, Prerog. 7th March 1727, and said there to have been often so determined ; but it being suggested

(a) Vide *Earl of Warwick v. Greville*, 1 Phill. 123.

that very material objections could be shewn ^{PREROGATIVE COURT.} against granting administration to William Mercer, I gave time to exhibit affidavits for that purpose. (a) ^{Hilary Term, February 18.}

BOXLEY and FRECK *against* STUBBINGTON. February 18.

Mary Stubbington, deceased, wife of William Stubbington, had power by marriage articles to make a will and dispose of one thousand pounds; she accordingly made her will on 4th September 1756, and appointed Messrs. Boxley and Freck her executors. The husband opposed the will. The proctor for the executors alleged that the original marriage articles were in the hands of the husband, and prayed that he might be assigned to bring them into court, which the husband's proctor opposed, and alleged that the counterpart of the articles signed by the husband were in the hands of Mr. Winter, her trustee.

In a contest respecting the validity of a married woman's will made under a power, the Court will decree a monition against the trustee under the marriage articles, though he may not be a party to the suit to bring in the counterpart of the articles, which were in his possession.

Per Curiam.

I thereupon refused to assign the husband to bring in the original articles, but decreed a monition against Winter (though he was not a party in the cause) to bring in the counterpart, which he did accordingly.

(a) *Vide infra*, p. 506.

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COURT.

By Day after
Hilary Term,
February 25.

A party called
upon to bring in
an inventory and
account and see
portions al-
lotted : account
objected to—ob-
jectious over-
ruled.

TURNER, by her Guardian, *against* HALL.

Thomas Hall died intestate in December 1755, leaving Ann Hall, his widow, who administered, and Sarah Turner, a minor, his granddaughter and only next of kin ; she by her guardian called the widow to bring in inventory and account, and to see portions allotted ; inventory and account given in ; the estate amounted upon a commission of appraisement to 758*l.* 12*s.* 0*d.* ; the guardian excepted to two articles in the account ; first to allowing thirty-six guineas for nine days' attendance of four commissioners at a guinea a-day each ; secondly to allowing forty pounds to Mr. Windus, an attorney, for settling deceased's books, making out his bills, and collecting in his effects.

Per Curiam.

But I allowed both articles : the first, because a guinea a-day is the usual allowance to a commissioner ; the second, because Mr. Windus made affidavit that the trouble he had had well deserved 40*l.* and he should insist on being paid so much.

February 25. LORD CARPENTER *against* SHELFORD and Others.

Administration
cum testamento
annexo granted
to a judgment
creditor in pre-
ference to other
creditors.

Dr. Hay for Young.—Sir Harry Pope Blount appointed his wife, Dame Ann Blount, executrix and residuary legatee, she has renounced, Mark Young, a creditor by judgment in 210*l.* and 2*l.* 10*s.* costs, prays administration *cum testamento* ; he has exhibited a copy of his judgment. Edward Law-

rence a creditor by bond in 200*l.* and interest, and William Mulliners, a creditor by bond in 100*l.* and interest, consent that administration should be granted to Young. Messrs. Reyniers, creditors by bond in 150*l.* pray to be joined with Young in the administration. Lord Carpenter, by virtue of a bond from Sir Harry to his father in 800*l.* penalty for payment of an annuity of 200*l.* during Sir Harry's life, prays that administration *cum testamento* may be granted to him.

PREROGATIVE COURT.

By Day after
Hilary Term,
February 25.

Dr. Simpson, for Lord Carpenter.—Deceased granted an annuity of 200*l.* a-year for his own life to the late Lord Carpenter by a demise of lands in 1746 for 99 years, and by way of collateral security gave him a bond in 800*l.* penalty; arrears of the annuity are unpaid; Young is only a nominal judgment creditor, for he has assigned his judgment to one Long, and therefore shewing the judgment is not sufficient evidence.

William Nicolls made affidavit that from what Cooper, Long's attorney, said to him, he *believed* Young had assigned the judgment to Long.

Per Curiam.

But there being no positive proof of such assignment, and Young therefore standing before the court as a creditor of a superior nature to all the rest, and Lord Carpenter not appearing to have any interest for he had not sworn any arrears of the annuity were due to him, I decreed administration *cum testamento* to Young, the judgment creditor, who consented to enter into articles to pay *pro rata*.

PREROGATIVE
COURT.By Day after
Hilary Term,
February 25.

Cook against Cowper.

An administratrix monished to pay the wife's distributive share in the effects of an intestate, to the husband, without her joining in any receipt, she having been divorced from her husband and having absconded.

Dr. Hay, for Cook.—Henry Cowper, deceased intestate, left Mary his widow, and Susanna Cook his only child. On the 8th April 1756, administration was granted to the widow. John Cook, the husband, he being divorced by sentence in the Consistory Court of London, and she absconding, commenced a suit against the administratrix in right of his wife, to give in an inventory and account and see portions allotted. On the 4th Session Michaelmas Term 1757, the court decreed distribution, and allotted for Susanna Cook's share 1981*l.* 11*s.* 10*qd.* and ordered that the husband should give bond with sureties to refund in case debts should afterwards appear. The administratrix is willing to pay the said portion, but declines doing it unless the wife joins in the receipt. The husband is entitled to this money, and though in the common cases the wife is required to join in the discharge for the money, yet in this case that cannot be expected, since she is divorced from him and absconds.

Dr. Smalbroke, for Cowper.—Cook's proctor prays that Cowper may be admonished to pay the money to John Cook the husband. This is not in the usual form.

JUDGMENT—SIR GEORGE LEE.

But as I had been of opinion he was entitled to carry on this suit in his own name in right of his wife, and as he would be deprived of this money,

the title to which vested in him as husband, if it was not to be paid without her receipt, which could not be obtained under the circumstances of this case, I decreed Mrs. Cowper to be admonished to pay the wife's distributable share to the husband, and that he should give a discharge for it as received in right of his wife, and that the minutes of the court as well as the monition should specially state the circumstances of the case ; and as Mrs. Cowper had done properly in taking the opinion of the court upon this point, I allowed her to deduct her expences for this motion out of the estate.

PREROGATIVE COURT.

By Day after
Hilary Term,
February 25.

SMITH against SMITHSON.

February 25.

After publication and when the cause stood assigned *ex 2da si non*, I decreed fuller answers, though objected to as too late ; but as the cause stood *si non*, the adverse party might have pleaded on this day, and consequently the cause was open for all purposes.

Further answers decreed after publication, and when the cause stood for hearing on the second assignation.

PREROGATIVE
COURT.

Caveat Day,
March 17.

MERCER *against* MORLAND. (a)

Upon this day no affidavits being exhibited to impeach the character of William Mercer, the brother of the whole blood to the deceased, but on the contrary there being an affidavit read of two persons who gave him a good character, I decreed administration to pass under seal to William Mercer, and condemned Thomas Mercer in costs, to be taxed the first session of Easter Term next.

March 17.

MILLER *against* SHEPPARD and Others.

An executrix named in a codicil has a right to propound the will as well as the codicil, inasmuch as the codicil was a part of the will and gave her an interest in it.

Catherine Hills, deceased, made her will on the 19th March 1763, duly attested; after giving several legacies she appointed Thomas Wollascot, Esq. and John Sheppard, Gent. her executors, and gave the residue of her estate to them in moieties. On the 20th January 1758, she made a codicil attested by three witnesses, in which she took notice of her will, and recited that since the making thereof Mr. Wollascot was dead and Mr. Sheppard was grown old, and she being desirous to benefit her dear friend Ann Miller, she therefore made the codicil, wherein she gave to said Ann Miller 3000*l.*, appointed her, together with said John Sheppard, executors of her will and codicil, which she declared to be part of her will, and gave

(a) *Vide supra*, p. 499.

to them two, the residue of her estate in moieties. Miller was not mentioned in the will of 19th March 1753. Upon deceased's death, Stevens, for Sheppard, entered caveat. Smart appeared for Ann Miller. Scripts and scrolls were ordered and brought in by Miller and Sheppard. Collins appeared for William Norris and Mary Rowley, who were confessed to be cousins and next of kin to deceased. Sheppard prayed probate of the will alone, and opposed the codicil; the next of kin likewise opposed the codicil, but did not declare whether they would oppose the will or not. Ann Miller prayed probate of the will and codicil, and would have propounded both, but Sheppard and the next of kin insisted that she had no interest under the will till she had proved and established the codicil, and therefore that she must first propound the codicil.

PREROGATIVE COURT.

Caveat Day,
March 17.

JUDGMENT—SIR GEORGE LEE.

I was of opinion she had a right to propound both the will and the codicil if she thought proper, for if the codicil was good it was a part of the will, and gave her an immediate interest in the will; and if she propounded and proved the codicil alone, the next of kin might afterwards oppose the will and force her into a second suit, which would be unreasonable; as to Sheppard, the executor in both will and codicil, his conduct was not very intelligible, for Miller's proving the will against the next of kin was doing his business for him, but it made it probable, that if he alone should propound the will there might be collusion between him and the next of kin to set it aside.

I therefore decreed that she should be at liberty to propound and prove the will and codicil together.

PREROGATIVE
COURT.

1st Session
Easter Term,
April 12.

An administratrix to the effects of a ropemaker directed to include in her account the profits arising from four apprentices, and to give security to the full amount of the inventory. She, however, was allowed her claim for mourning.

PITT, by his Guardian, *against* PITT.

Dr. Hay, for the minor.—Henry Pitt died in 1755, a widower intestate, left James Pitt his son, aged fifteen; in December 1765, administration was granted to Maidson Pitt, his aunt, who he chose his guardian; the minor afterward chose John Davis his guardian, who cited Maidson Pitt to exhibit an inventory and account, and to give better security, otherwise to shew cause why administration should not be revoked and granted to him for the use of the minor. The deceased was a rope-maker in the king's yard at Woolwich and as such had four apprentices; she gave in an inventory, but omitted a stack of clover which sold for 10*l.*, and a horse which sold for thirteen guineas, and also the profits arising from three of the apprentices; in a further inventory she charged herself with the clover and horse, and admitted she had received wages earned by said three apprentices in the yard to the amount of 16*l.* 19*s.* 3*d.* We insist that she has acted fraudulently, and pray that her administration may be revoked, and that she may be obliged to charge herself with the money earned by the three apprentices, and may be condemned in costs.

Dr. Smalbroke, for Maidson Pitt.—Richard Weaver, one of the four apprentices, was bound to deceased in 1755, and by his indentures he is bound to deceased his heirs, executors, administrators, and assigns, but the other three apprentices who were bound in 1752, are bound to the deceased only, and therefore their apprenticeship to the

deceased expired with his death and she has taken them as her apprentices. She admits she has received upon their account 161*l.* 19*s.* 3*d.*, which she claims as her own.

PREROGATIVE COURT.

Easter Term,
April 12.

Dr. Hay, for the minor. — The whole inventory amounts only to 395*l.* 16*s.* 8*d.* She now confesses she has omitted 23*l.* 13*s.*, but our grand objection is, that she has not charged herself with the profits of three apprentices, the moiety of which, viz. 161*l.* 17*s.* 3*d.*, she admits she has received and applied to her own use ; the variation in the indentures makes no difference, for all the apprentices are to serve seven years.

Dr. Simpson, same side. — The whole sum omitted is 185*l.* 12*s.* 3*d.*, and she has craved an allowance of 14*l.* for first and second mourning for herself, which we say ought not to be allowed.

Salk. p. 66, *The King against Pecke*, justices of peace made an order upon executors to maintain an apprentice bound to their testator, the Court quashed the order, because it did not appear that the deceased had left effects ; but Holt C. J. said executors must maintain the apprentice of their testator if he leaves sufficient assets, and that by custom of London executors must instruct the apprentice or turn him over to one of the same trade. Salk. fo. 61, the same. The Court has power to revoke this administration, for an administrator *durante minoritate* is only a trustee.

JUDGMENT—SIR GEORGE LEE.

I was clearly of opinion that she, who did not belong to the yard, could have apprentices

**PREROGATIVE
COURT.**

**Easter Term,
April 12.**

there only as administratrix to the deceased, and that the profits of them belonged to his son as his representative, for whom she was only a trustee, and I therefore decreed her to charge herself with the profits arising from all the apprentices, and with the clover and horse, but allowed her claim for mourning, and did not revoke the administration, but ordered her to give security to the full amount of the inventory, and condemned her in the costs of the motion.

April 12.

AKERMAN and NORRIS against GYBBON.

**A declaration
held to be suffi-
ciently full.**

Thomas Farrant died in 1741, made a will, but no executor or residuary legatee; was a bachelor; left Thomas Gybon his nephew, Mary Franklyn and Elizabeth Church and others, his nieces and next of kin; by consent of Thomas Gybon, administration *cum testamento* was granted to Mary Franklyn in May 1741. She afterwards died, leaving great part of the estate unadministered, and in December 1748 administration *de bonis non cum testamento* was granted to Elizabeth Church. On the 10th October 1749, Thomas Gybon died intestate, and administration to him was granted to Jane Gybon his widow. In November 1757 Elizabeth Church died, and then Jane Gybon entered caveat in the goods of Thomas Farrant and Elizabeth Church. Isaac Akerman and William Norris, executors of Church, warned the caveat entered as to her effects; probate of her will was decreed to her executors they undergoing a

thonition to exhibit an inventory of the effects of Thomas Farrant remaining in the hands of Elizabeth Church at her death. On 4th Session Hilary Term 1758 they gave in a declaration. On the By-day after the said term, Gybon's proctor alleged the declaration was not full, because it contains only an account of such effects of Farrant's as now remain in the hands of Church's executors.

PREROGATIVE
COURT.
—
Easter Term,
April 12.

JUDGMENT — SIR GEORGE LEE.

But it appearing on the face of the declaration that they swore they knew of no other effects of Farrant's than what they had set forth in the said declaration, I held that it was sufficiently full.

ARCHES COURT OF CANTERBURY.

CHRISTMAS HUET against DASH.

2d Session
Easter Term,
April 17.

(An Appeal from Winchester.)

Dr. Hay, for Robert Dash. — Robert Dash cited Christmas Huett to answer to articles for brawling, chiding and quarrelling in the church of Wickham in Hampshire ; pleaded that on Sunday the 3d of August 1755, the said Christmas Huet called Dash " rogue and rascal" and other names, and afterwards in the vestry church-porch

The statute 5
and 6 Edw. 1.
c. 4. leaves no-
thing to the dis-
cretion of the
judge, but the
duration of the
suspension *ab
ingressu eccle-
siae.*

ARCHES
COURT.

EASTER TERM.
April 17.

abused Dash and others. Witnesses were examined, and on 12th November 1756 the judge pronounced that Huet was guilty of brawling, &c. on the 3d of April, and decreed him to be suspended *ab ingressu ecclesiae* for a month, and condemned him in 6*l.* costs, from which decree Huet has appealed.

Dr. Simpson, for Huet. — We shall shew from their witnesses, for we have examined none, that Huet was the aggressor.

Witnesses for Dash.

1. Thomas Webb. — Huet is a layman; on Sunday 3d August 1755, in the church of Wickham, the deponent heard Dash say to Huet, "You are a rascal;" Huet replied, "You are a rogue," and Dash offered to fight Huet for two guineas.

2. Thomas Cutler. — After church on 3d August 1755 the deponent heard Dash say to Huet in the church-porch, he would fight him for two guineas; there was a great quarrel between them, but he knows not which began.

3. John Swan, parish clerk of Wickham. — After church on a Sunday in August 1755, the deponent heard a dispute in the church between Robert Dash and Francis Huet about a poor's rate, but the deponent did not hear Christmas Huet say any thing in the church, but there was very abusive language passed in the church-porch between Christmas and Francis Huet and Robert Dash; the deponent cannot set forth the particular words used or who was the aggressor, but he heard Dash offer to fight Christmas Huet.

4. John Ward. — On a Sunday in the summer of 1755, deponent heard a great quarrel in Wickham church-porch, but did not hear the particular words, but heard Dash tell Christmas Huett he would bring a man to fight him if he would fight; deponent did not hear Huett's answer; deponent did not hear Huet call Dash a rogue, &c., but believes they quarrelled in the church-porch; Dash was overseer of the poor.

Arches
Court.
—
Easter Term,
April 17.

3. Int. Does not know who began the quarrel.

5. Francis Huett. — Christmas Huett is the deponent's son, and is a sober well-behaved man; on Sunday, 3d August 1755 the parishioners were assembled at Wickham church, and talking of the poor's rate; Dash abused Christmas Huett very much, and offered to fight him; Huett used no angry words to Dash.

Dr. Simpson, for Huett, urged that the churchwardens should have presented Huett at the visitation, and they should have promoted articles against him, and not Dash, who was a party concerned and was the aggressor; that he was more the object of punishment than Huett, for all the witnesses proved that he abused Huett, and offered to fight him, and Francis Huett says Christmas used no angry words; two witnesses do not depose to particular words of brawling, chiding, and quarrelling; the statute meant to punish only those who intended to make a disturbance, and there ought to be a clear evidence of such intention, which there is not in this case. By the civil law no action lies against him who only replies to an abuse, because he received the first provocation; the judge below is not warranted for suspending

ARCHES
COURT.

EASTER TERM,
APRIL 17.

for so long a time as a month under the circumstances of this case, nor in giving costs.

Dr. Hay, contra, cited the case of *Foot* against *Richards* and *Bartlett*, Arches, 23d February 1753, where it was held that a person cannot justify brawling by proving another person also brawled.

JUDGMENT — SIR GEORGE LEE.

I was of opinion that the statute not having directed who should prosecute, any party whatever might promote articles; that Huett might have articedled against Dash if he had thought proper, but he could not justify himself by shewing that Dash was the aggressor, because the statute had not allowed any such defence, nor left any thing to the discretion of the judge but the duration of the suspension, but had expressly directed that any person who was proved to have brawled, quarrelled, &c. in the church or church-yard should be suspended; that in this case the witnesses had all, except Francis Huett, proved that Christmas Huett and Dash had mutually quarrelled in the church-porch, and therefore had brought him within the statute. I could not think a month an unreasonable time for the suspension; it commonly was six weeks; and as to costs, they are always given when a person is found guilty upon this statute, and these were small costs. I therefore affirmed the sentence, remitted the cause, and condemned Christmas Huett in 14*l.* costs.

N. B. Articles were promoted against Francis Huett, the father of Christmas, by Dash, for brawling also at the same time and place; which cause Dr. Simpson admitted was exactly the same; I therefore heard a witness read, and gave the same sentence and costs in that cause likewise.

ARCHES
COURT.Easter Term,
April 17.

ARGAR against HOLDSWORTH.

3d Session
Easter Term,
April 24.

(Appeal from Exeter.)

Dr. Simpson, for Argar.—William Argar promoted articles in the Court of the Archdeacon of Totness, against Henry Holdsworth, vicar of St. Saviour's in Dartmouth, for neglecting or refusing to solemnize marriage between the said Argar and Jane How, both of the parish of St. Saviour's, and having a licence to be married from the Chancellor of Exeter. On 18th September 1756, the articles were admitted at Totness, pleading, 1st, that Holdsworth is a clerk and vicar of St. Saviour's in Dartmouth; 2nd, that by canons, &c. every minister is to obey his ordinary's licence, &c.; 3d, that every minister is obliged by law to marry such of his parishioners as have resided a month in his parish; that the parties named in the licence are his parishioners, and have resided a month, and have obtained a licence to be married together; 4th, that Argar had a proper licence to marry How, and acquainted Holdsworth therewith, and desired him to marry them, but he refused; 5th, that he has thereby incurred ecclesiastical censures; 6th, that he is subject to the

A clergyman
may be prose-
cuted by any
one for neglect
of his clerical
duty.

A licence
from the ordi-
nary is a legal
authority to a
clergyman to
solemnize a
marriage, but if
a clergyman
suspects fraud,
delay may be
justifiable for
the sake of in-
quiry.

ARCHES
COURT.

Easter Term,
April 24.

jurisdiction of the Court at Totness; 7th, pray he may be censured, &c. From admitting these articles, Holdsworth appealed to the Chancellor of Exeter. On 4th March 1757 the Chancellor pronounced for the appeal for admitting the 3rd and 4th articles, as not concludent, &c. and rejected said articles, but admitted the rest, and retained the cause, with costs. Argar appealed to the Arches from rejecting the third and fourth articles, and retaining the cause, and condemning him in costs, and Holdsworth did not adhere to the appeal.

Dr. Bettesworth, for Holdsworth, — said that Argar should have brought a suit at law for damages, or if any suit lay in the Spiritual Court, it should have been brought before the Chancellor of Exeter, who granted the licence; that the licence was not exhibited, without which the articles were not concludent; that a minister is not obliged by law to marry by licence, but is only permitted so to do, and if he has reason to think it was fraudulently obtained, he ought to refuse to marry in consequence of it, which was the case with Holdsworth; and, therefore, the judge ought to have rejected all the articles.

JUDGMENT — SIR GEORGE LEE.

I said, that possibly Argar might have an action for damages, but, nevertheless, the clergyman might be prosecuted by any one for neglect of his clerical duty; — that the suit for such neglect might be brought in order to his being admonished or suspended in the Archdeacon's Court, notwithstanding the licence was granted by the Chancellor; — that the licence might be exhibited at any

time before conclusion of the cause ;—that I was of opinion a licence was a legal authority for marriage, and that a minister was guilty of a breach of his duty who should refuse to marry pursuant to a proper licence from his ordinary. If Holdsworth had reason to believe the licence was obtained fraudulently, and only delayed to gain time for inquiry, that would be proper matter for his defence ; but surely the Chancellor had acted strangely in rejecting the articles which alone pleaded the facts relative to this cause, and admitting those articles which pleaded only the general law. I, therefore, pronounced for the appeal, and remitted the cause to the Archdeacon's Court at Totness, and condemned Holdsworth in 25*l.* costs.

ARCHES :
Court.
—
Easter Term,
April 24.

PREROGATIVE COURT OF CANTERBURY.

POWELL against BURGH and Others.

3d Session
Easter Term,
April 26.

Dr. Bettesworth, for Mary Powell. — Mary Powell, a creditrix, cited Mary Burgh, wife of Henry Burgh, clerk, *Emmy* Powell, wife of John Powell, Esq., and Ann Williams, widow, the daughters and only next of kin of Godfrey Harcourt, of Wirewoods Green, Esq. widower, deceased, to bring in his will if he made any, and to

In a testamentary suit, the citation of a party by an erroneous christian name, there being no doubt as to the identity of the person, holds to be sufficient.

PREROGATIVE
COURT.

Easter Term,
April 26.

take probate if they or any of them are executors therein, or if he died intestate to take administration, or to shew cause why it should not be granted to said Mary Powell, a creditrix, and to exhibit an inventory. Farrer appeared for Mary Burgh and Ann Williams, and declared that deceased died intestate, and that they would not take administration. Smith appeared for *Emmy* Powell, under protestation, and alleged that she was cited by a wrong name, her true christian name being *Amy*, and not *Emmy*, and prayed to be dismissed with costs.

Dr. Simpson, for Amy Powell, insisted that she being cited by a wrong christian name, ought to be dismissed, and cited the following cases: Arches, Easter Term 1719, *Barwood* against *Lark*, Barwood was cited by name of Burwood, dismissed for the misnomer, and held, that a misnomer ought to be alleged before issue joined. Arches, 2d July 1735, *Johnson* against *Richardson*, Richardson promoted articles against Johnson by the description of rector of Melford, in the county of *Norfolk*, for brawling in the church-yard of Melford; issue joined, witnesses examined, and sentence given against Johnson at Norwich; he appealed to the Arches here; objection was taken, that he was wrong described, for he was rector of Melford in *Suffolk*, and there is no place of the name of Melford in *Norfolk*; upon this objection the whole proceedings were set aside, and Johnson dismissed from the cause with costs. Prerogative, 11th December 1732, *William Becker*, deceased, Kenrick, a creditor, cited the widow to take administration; she appeared

and alleged that the deceased made a will, and appointed John Ayres executor, Kenrick cited him by name of John Ayres, he appeared under protestation, and alleged his name was *Eyre*; he was dismissed with costs.

PREROGATIVE COURT.

Easter Term,
April 26.

JUDGMENT—SIR GEORGE LEE.

I thought the cases cited did not come up to the present: the two first were upon prosecutions where greater strictness is required, and that case of *Eyre*, in the Prerogative, was plainly a wrong name, and it did not appear that he had any addition whereby to be ascertained; but in the present case it was doubtful whether *Amy* and *Emmy* were not the same name; but be that as it might, there was such a description as left no uncertainty as to the person meant to be cited, for she was described to be the wife of John Powell, Esq. and the daughter of Godfrey Harcourt, Esq. of Wirewood's-Green, in Gloucestershire. If a nobleman is cited by a wrong christian name, if his title of honor is right, it is sufficient, because that is a sufficient description of him. In the Prerogative less nicety in the processes to accept or refuse, is required, because those processes run with intimation and do not precisely require an appearance, and I thought trifling objections, which had nothing in them essential to the benefit of the party, but only tended to obstruct justice, ought to be discouraged; I therefore overruled the protestation, and ordered Amy Powell's proctor to appear absolutely.

PREROGATIVE
COURT.

Easter Term,
April 26. **MILLER against SHEPPARD and OTHERS. (a)**

The handwriting
and character of
a living witness,
but who was
resident in an
enemy's country,
admitted to
proof.

This day an allegation was offered by Miller, propounding the will and codicil together; the 1st article pleaded the factum of the will in the common form; the 2d and 3d articles pleaded that Francis Wyke, one of the subscribing witnesses, was dead, and pleaded his handwriting and good character; the 4th and 5th articles pleaded that John Boucher, the other subscribing witness, resided at this time in French Flanders, and by reason of the war could not be come at to be examined, and therefore pleaded his handwriting and good character as if he had been dead; the rest of the articles propounded the codicil in the usual manner. The counsel for Sheppard, who is named one executor in both will and codicil, but who opposes the codicil, and also the counsel for Norris and Rowley, deceased's next of kin, joined in opposing the 4th and 5th articles, and insisted that the handwriting of a witness who was alive, and his character, could not be admitted to be proved, for the adverse party would be deprived of the benefit of cross-examining, and the precedent would be dangerous; for it would become a practice to send witnesses out of the way to avoid cross-examination, which perhaps might be the present case.

JUDGMENT—SIR GEORGE LEE.

But as I thought there was great reason to suspect collusion between Sheppard and the next of

* Vide supra p. 506.

kin, and as this witness could not be come at PREROGATIVE COURT. during the war by Miller, I admitted those two articles to proof, but directed she should specify the time when Boucher went abroad, that it might appear whether it was probable he was sent abroad to prevent cross-examination.

Easter Term,
April 26.

ARCHES COURT OF CANTERBURY.

GREEN against Mayo formerly HOLLIER.

4th Session
Easter Term,
May 5.

John Hull made his will, 4th June 1756, appointed Elizabeth Mayo, formerly Hollier, sole executrix and residuary legatee; deceased died 23d October 1756, and Mayo proved his will that day; bequeathed a legacy of five pounds to his sister Elizabeth Green; she, in May 1757, and again on the 20th and 24th October 1757, sent her daughter to demand said legacy of Mayo, and the last time sent a receipt for it; Mayo said she would come to Green's house the next week, and pay it, but she did not, whereupon Green took a citation to call her in a cause of legacy, which passed under seal on 31st October 1757, and the officer of the court swore he sought Mayo at her usual habitation on that day, and on the 1st and 2nd of November, but could not have access to her to serve her personally. On 1st November, Mayo and her husband and others came to Green's

In a cause of legacy in which issue had been joined, the tender of payment holds not to be sufficient unless accompanied by a payment of the costs incurred in the institution of the suit.

ANNUAL
COURT.

EASTER TERM,
May 5.

house and tendered her five pounds for her legacy ; Green said the matter was now in the hands of her lawyer and they must pay the money to him, and refused to accept it ; whereupon they said they would leave it upon her counter, and she might throw it into the street if she pleased ; thereupon Green called a neighbour, Mrs. Blower, and desired her to take and keep the money in safe custody, but, as Green expressly swore, did not desire her to keep the money for her (Green's) use. The citation was returned 3rd November, and a citation *vis et modis* issued. Mayo at last appeared, and on the By-day, Michaelmas Term 1757, a libel in usual form for the legacy was admitted. 1st Session Hilary Term 1758, Mayo's Proctor gave a negative issue. The question was, whether this tender, made extrajudicially, without offering costs, after the citation was under seal, and Mayo had been sought by the officer, was a sufficient legal tender to excuse Mayo from costs, and to throw them upon Green ; and having heard affidavits on both sides—

JUDGMENT—SIR GEORGE LEE.

I was of opinion it was not a sufficient tender, for Green had expressly refused it because a suit was begun, and she had been at the expence of taking out a citation ; and Mayo's proctor should, when he first appeared for her, or at least before he gave a negative issue, have made a tender of the legacy in court, with such costs (if any) as were due by law ; but not having alleged the special matter, but having given a negative issue, she had denied the legacy to be due, contrary to her extra-judicial confession on 1st November, when she tendered the legacy to Green, and had thereby

subjected herself to costs. I therefore overruled Mayo's petition, and as issue had been joined, assigned the cause for sentence on the merits ; and on 1st Session Trinity Term, 22nd May 1758, I heard the cause upon the merits, gave sentence for the legacy of five pounds to Green, and condemned Mayo in 20*l.* costs.

ARCHES
COURT.

Easter Term,
May 5.

LLOYD against LLOYD.

1st Session
Trinity Term,
May 22.

An appeal on
grievances, en-
tertained.

David Lloyd, deceased, made his will in June 1753, and appointed Ann, his wife, executrix, who took probate in common form at St. Asaph, in October 1755. William Lloyd, deceased's father, cited her to prove the will by witnesses ; she propounded it ; in February 1756 the father pleaded deceased's incapacity ; she pleaded the contrary ; several witnesses examined on both sides. On the 20th January 1757, both proctors prayed publication, and copies of the depositions were accordingly delivered to both. On the 21st April 1757, William Lloyd's proctor alleged that since publication more witnesses had come to his client's knowledge, and prayed a commission to examine them touching deceased's insanity ; the judge decreed a commission. Ann's proctor protested of appealing, but afterwards waved his appeal. On the 12th May 1757, William's proctor prayed a monition and inhibition to both parties not to intermeddle with deceased's effects pending the suit, and also a commission to examine witnesses as aforesaid, both which the judge decreed

ARCHES
COURT.

Trinity Term,
May 22.

without proof or even a suggestion that she had embezzled any of the effects, and notwithstanding that she as widow would be intitled to a moiety of the estate under an intestacy. Ann appealed from this decree to the Arches, and gave in a common libel. In the 1st Session Michaelmas 1757, Farrer appeared for William Lloyd, and gave a negative issue; soon after William died and his representative was cited. Farrer appeared for her to save her contumacy, confessed the identity and subscription to the appeal, but declared his client, the representative of William Lloyd, would proceed no further in the cause; whereupon the grievances appealed from came on to be heard *ex parte*.

JUDGMENT — SIR GEORGE LEE.

I was clearly of opinion that both parts of the decree were wrong, and that grievances were done to Ann Lloyd; but I had some difficulty about the commission for examining witnesses, because that part of the decree now appealed from was only a continuance of the decree made on 21st April 1757, from which Ann's proctor had appealed and then had waved his appeal; but as the first part of the decree relating to the inhibition to meddling with the effects was duly appealed from, and as the Court would upon the hearing have suppressed the depositions of the witnesses taken after publication, in case they had actually been examined, I pronounced generally for the appeal, retained the cause, and assigned it on for sentence.

PREROGATIVE
COURT.

PREROGATIVE COURT OF CANTERBURY.

2d Session
Trinity Term,
June 1.BROOME *against* ELLIS.

Isaac Broome, deceased, made his will, dated 3d January 1758; gave a legacy of fifteen pounds to his brother Joseph Broome, his only next of kin, and gave all the rest of his effects to Jane Ellis, who lived with him as his shop-woman, and made her sole executrix; deceased died on 16th March 1758, after a long illness; Jane Ellis proved the will in common form on 17th March; the brother cited her to prove it by witnesses; she gave in a common condit and examined the two subscribing witnesses, whom the brother cross-examined, but did not plead himself; the witnesses deposed to the following effect.

A subscribing witness who contradicts his own act of attestation may be a good witness to support another subscribing witness in other circumstances.

1. John Keyloch, looking-glass maker.—Deponent came to know deceased about six years ago, and often went to him; about a fortnight before the will was made deceased told deponent he had made his will, but was very uneasy about it, and asked deponent if he would alter it for him; deponent said he would whenever he pleased; in the evening of 3d January 1758, deponent called to ask how deceased did, Jane Ellis then told deponent deceased was very uneasy, and could not rest till his will was altered; deponent went into the parlour to deceased, who directly ordered Ellis to fetch his will, which she did, and deceased desired deponent to read it to him, which deponent did; deceased asked deponent what he thought of it,

PARROGATIVE
Court.

Trinity Term,
Jane 1.

and whether Mr. Walker had not too near a connection with Ellis, he being an executor in said will, and a principal creditor to deceased; deponent said he thought he had; deceased then desired deponent to write a new will, only leaving out the name of Walker, and making Jane Ellis sole executrix; deponent asked him about that three or four times, and deceased said he would have her sole executrix, *but he asked deponent whether she might not take in Mr. Vesey to assist her in getting in the debts*; deponent said he believed she might; he replied, then I will leave her sole executrix; deponent from the former will, and said instructions, wrote in deceased's presence the will propounded; deceased desired deponent to read it to him, which deponent did audibly and distinctly; deceased desired him to read it again, deponent did and deceased approved it, and then directed Ellis and Smith his book-keeper to be called in, and they being come, deponent folded down the will and deceased wrote his name as well as he could, but deponent not thinking it legible and plain, wrote over it the mark, &c. and then deponent sealed it with a wafer, and deceased said "I deliver this as my will and testament," in presence of John Smith and deponent, who then attested it in deceased's presence and at his request; deceased then appeared to be perfectly in his senses.

8. Int. Respondent read the will in the words in which it now appears, and believes deceased perfectly understood it. 9. Int. It was executed about nine at night, no discourse passed but what is before set forth. 10. Int. Deceased signed the will voluntarily, and was not importuned to do it. 12. Int. Ellis was shopwoman to deceased, but not

a relation. 13. Int. Respondent never heard deceased was dissatisfied with the will, deceased lived till the 16th March following. Int. 14. Deceased was in a weak low condition. Respondent heard Ellis say he was several times out of his senses in his illness, but deceased was not greatly impaired in his senses.

PREROGATIVE COURT.

Trinity Term,
June 1.

2. John Smith, bookseller.—Deponent came to live with deceased as his book-keeper, and staid with him six weeks, about the end of November or beginning of December 1737. On 3d January 1758, deponent was *sent by deceased himself to Mr. Vesey*, one of deceased's creditors, to desire him to come to deceased that afternoon, and from what he heard Ellis say, he apprehended deceased sent for Vesey to make his will, but Vesey did not come. About eight that evening deponent being called, went into the parlour to deceased and Mr. Keyloch, and a paper which deponent then apprehended to be a will lay ready wrote, deceased then wrote something at the bottom of said paper, but it not being legible, Keyloch made a cross or something under it, and deceased took an halfpenny off the wafer at the bottom of said paper, but did not say any thing, or that it was his last will and testament, and deponent and Keyloch then both signed said paper as witnesses in presence of deceased; and deceased during said transaction did not appear to deponent to be, and was not as he believes of sound mind, or capable of making a will, as he did not say it was his will, or utter one syllable as deponent remembers.

8. Int. The will was not read to deceased in deponent's presence, deceased was in a bad state of health. 9. Int. Respondent did not hear deceased say any thing to express his approbation of

**PREROGATIVE
COURT.**

**Trinity Term,
June 1.**

the will. 10. Int. Keyloch desired deceased to sign the will, and deceased did it voluntarily. 11. Int. Respondent attested it. 13. Int. Respondent don't know that deceased expressed any dislike to the will. 14. Int. Deceased while deponent lived with him was in a very weak condition and much impaired in his senses; about a fortnight before the will was made, deponent heard Ellis say that the deceased had not been in his senses a quarter of an hour since deponent had been in his house. 15. Int. Respondent heard Ellis tell Joseph Broome, that deceased had left him executor in a former will.

Dr. Hay, counsel for Joseph Broome, the brother.—Argued, that John Smith having deposed to deceased's incapacity contrary to his own attestation to the will, no credit could be given to him, and therefore he could not be considered as a witness in the cause, and consequently there was only one witness to support the will; but by law, no will for personal estate can be pronounced for without two witnesses, or at least one witness, and such circumstances as are equivalent to another witness.

JUDGMENT—SIR GEORGE LEE.

But I was of opinion that Smith was a good witness to support Keyloch in every other part of his deposition, but where he contradicted his own act of attestation, and that he had supported him in many material circumstances, and therefore upon this evidence I pronounced for the validity of the will dated 3d January 1758, and decreed the probate to be delivered out of court to Jane Ellis, the executrix.

PREROGATIVE
COURT.MURPHY *against* MCCARTHY.3d Session
Trinity Term,
June 8.

Felix M'Carthy, a mariner, in one of the king's ships, died intestate; administration was granted to Elizabeth, his widow; on 10th March 1758 a citation was taken by Hughes, as proctor for Maurice Murphy, who claimed to be executor of a will of the deceased's, against the widow, to bring in the administration and shew cause why it should not be revoked, &c. Hughes obtained a certificate from the Prerogative-office that such citation had issued, which was shewn at the Pay-office at Portsmouth, to prevent the widow from receiving any money due to the deceased; but the citation never was served on the widow.

Upon motion by counsel, these facts being alleged, I declared the citation void, dismissed the widow, and condemned Murphy in 13*s.* 4*d.* costs. Hughes was not in court, another proctor appearing for him, but I declared I would have condemned him in costs if I could have done it by law.

A citation which
had not been
served on the
party against
whom it had
been entered,
holden to be
void.

ARNOLD *against* EARLE.

, June 8.

Thomas Newbee, a minor, aged near sixteen years, died 27th January 1756, he left an uncle, Benjamin Newbee, of the whole, and two uncles, William and Richard Arnold, of the half-blood, his only next of kin; on the death of his grandfather on 11th January 1754, the minor chose

A will made by
a minor of six-
teen in favour of
his guardian and
schoolmaster,
substantiated by
evidence.

**PREROGATIVE
COURT.**

**Trinity Term,
June 8.**

George Earle, his schoolmaster at Deptford, with whom he boarded and lodged, his guardian. On 14th December 1754, deceased made a will wrote by an attorney, in which he gave all his estate to Mr. Earle and Mrs. Allen, now Earle's wife, but then his housekeeper. In October 1755, he made another will, all of his own hand-writing, which was almost a transcript of the former by which Earle was made universal legatee and executor; this second will is said to be made, because Allen the joint devisee was become wife to Earle. On 16th December 1755 he made a third will, wrote with his own hand, which was almost a transcript of the two former in which he made Earle executor and universal legatee; this last will was said to be made, because one of the subscribing witnesses to the second was dead. On the day the deceased died, Earle took probate of this last will. William Arnold, one of the uncles, cited him to prove it by witnesses. Earle propounded the will, and examined the two subscribing witnesses, who were persons of unblemished character; they swore that the deceased read the will twice over to them, declared his entire approbation of it, and said that it was all his own handwriting, that he had no regard for his uncles, for they had shown none to him, and that he was resolved to leave all he had to Earle, for he and his wife had been parents to him, and that he duly signed, sealed, and published the will in their presence, and desired them to attest it, which they did in his presence, and that deceased was perfectly in his senses. Arnold pleaded that the deceased was influenced by his schoolmaster, by cajolery at some times, and threats and severities at other times, to make the will contrary to his inclinations; he examined

several witnesses to prove fraud and imposition, but most of them proved directly the contrary, in so much, that the counsel for Arnold confessed that the will was sufficiently proved with respect to the evidence, but that from the circumstances of the case fraud must be presumed, and that the minor was not of legal age for making of a will for personal estate; for that by law he ought to be seventeen or eighteen years of age.

PREROGATIVE
COURT.
Trinity Term,
June 8.

JUDGMENT — SIR GEORGE LEE.

But I was of opinion that by law a male may make his will for personal estate at fourteen, (a) and a female at twelve, the ages at which by law they are capable of marriage, unless it appeared they had not a capacity to understand the act they did, the contrary of which appeared in this case; and therefore, the evidence in support of the will being strong and clear, I pronounced for the validity of the will, but gave no costs, because the circumstances of the case did *prima facie* create strong suspicions which it concerned Earle to clear up, which I thought he had done, and the uncle lived at a distance and could not himself know the facts. It did indeed appear, that one Thomas Gulling (who was a witness in the cause, and with whom the uncles had agreed that he should carry on the suit, and who was to have a share of the estate if the will should be set aside) had attempted to suborn some of the witnesses, but as it did not appear that William Arnold, the uncle, was privy thereof, I thought it not a sufficient ground to charge him with costs.

(a) Godolph. O. L. 22. 2 Black. Com. 497.

PREROGATIVE
COURT.

4th Session
Trinity Term,
June 14.

The cancellation
of one duplicate
is the cancellation
of both.

Opportunity
afforded to the
adverse party
of shewing that
the cancellation
was not done
animi cancellandi.

BOUGHEY *against* SIR WILLIAM MORETON.

Dame Jane Moreton, wife of Sir William Moreton, made her will dated 29th May 1754, pursuant to a power given her by her marriage settlement; the day before this will bears date, a new settlement was made, in which she had a new power given her to make a will; of the said will she appointed George Boughey and Nicholas Gilbert executors, and Jane Compton, Elizabeth Bromfield, and John Bromfield, esq. residuary legatees; she died soon after. Caveat was entered by Sir William. Boughey warned it (Gilbert did not intermeddle) and prayed probate of the uncancelled duplicate. Sir William alleged that the duplicate which deceased had in her custody was found cancelled; that he, as husband, was entitled to, and he prayed, administration to deceased as dying intestate. Scripts and scrolls were prayed and decreed. Boughey and Elizabeth Bromfield brought in the uncancelled and the cancelled duplicates, dated 29th May 1754, with an affidavit, in which they swore that the deceased executed duplicates of the said will, one part of which she kept herself, and the other part she delivered to Boughey, which she had never demanded of him, or intimated that she had cancelled the other part, and they further swore that on searching for her will with Sir William's consent about two months after her death, they found in a hair-trunk in her chamber, or in the closet adjoining to it, the duplicate she kept, with her name and seal and the entire attestation of the witnesses, torn or cut off, and that there were also in the trunk former old cancelled wills

made before her marriage, and that she used to carry this trunk with her when she went out of town, which they therefore called her travelling trunk. Sir William swore that he believed the deceased cancelled it herself, it being found in the state it now was upon the search, which was the first time he ever saw it. Upon these affidavits the matter was brought before the Court to determine whether probate should be granted to Boughey of the uncancelled duplicate, or administration should be granted to Sir William as husband.

PREROGATIVE COURT.

Trinity Term,
June 14.

JUDGMENT—SIR GEORGE LEE.

I was of opinion that a cancellation of one duplicate was in law a cancellation of both, (a) and that as the cancelled duplicate was found in her custody, and it did not appear that any other person had access to it, it must be presumed that the deceased cancelled it herself. I therefore refused to grant probate to Mr. Boughey as prayed upon the evidence now before me, but gave him time to next Court to determine whether he will propound the uncancelled duplicate, and will take upon him to prove, either that the other part was cancelled by some other person, or if by the deceased, that she did it inadvertently or accidentally, and not *animo cancellandi*, otherwise I decreed administration to her as dying intestate to be granted to Sir William Moreton as husband.

(a) *Rickards v. Mumford and Freeman*, 2 Phill. 23. *Colvin v. Fraser*, 2 Hagg. 266.

PREROGATIVE
COURT.Trinity Term,
June 14.

Simple contract debts make *bona notabilia* where the deceased died; whereas specialty debts constitute *bona notabilia* at the place where the specialty is at the time of the death.

The mere entry of a caveat will not found the jurisdiction.

FRANCE *against* AUBREY.

Mayzod Dawkins made her will, and (as suggested) appointed Catherine France executrix. Richard Gough Aubrey, claiming to be her next of kin, took administration to her as dying intestate, in the Consistory Court of St. David's, in which diocese the deceased lived and died, and Mr. Rushworth, as proctor for Aubrey, entered caveat in the Prerogative against any thing being done in the goods of deceased without notice. France warned the caveat, and prayed that the administration might be decreed to be brought in and revoked, and that probate of the will might be granted to her. Rushworth, for Aubrey, denied the jurisdiction of the Court, and alleged that deceased did not leave *bona notabilia*. France propounded the jurisdiction, and this day her allegation consisting of three articles was debated. The first article pleaded generally that the deceased resided and died in the diocese of St. David's, and left *bona notabilia* in divers dioceses sufficient to found the jurisdiction of the Prerogative Court. The 2nd article pleaded that Richard Gough, father of the party, Aubrey, was at the deceased's death, and now is, indebted to her estate in the sum of five guineas, and that he resides in the diocese of Gloucester. The 3rd article pleaded that Aubrey did enter a caveat in the Prerogative in the goods of deceased, and had thereby acknowledged and founded the jurisdiction of that court.

JUDGMENT — SIR GEORGE LEE.

I admitted the first article as pleaded, ordered

the nature of the debt pleaded in the 2nd article to be specified, for if the five guineas were due to the deceased by simple contract, the debt was personal and would make *bona notabilia* where the debtor lived ; but if they were due by specialty they would make *bona notabilia* where the specialty happened to be at the deceased's death ; and I rejected the 3rd article, being clearly of opinion that barely entering a caveat would not found the jurisdiction, for it might be entered (as this was said to be) with intent to deny the jurisdiction, and prevent this court from taking any cognizance of the matter.

PREROGATIVE COURT.

Trinity Term,
June 14.

N.B. On the By-day of this term the proctor for France prayed that I would decree Aubrey to bring in the administration and leave it in the registry ; but as the allegation pleading *bona notabilia* was not proved, and consequently my jurisdiction was not founded, I refused to make such order.

MARTIN *against* ROBINSON.

By-Day after
Trinity Term,
June 21.

Peter Petersen, alias Pitts, made a will dated 5th September 1747, and appointed Erasmus Robinson and Mary his wife (with whom he lodged) executors ; he afterwards went a mariner in the St. George East Indiaman, where he made another will dated 10th January 1749-50, and appointed Swain Martin, another mariner in said ship, his executor, and soon after died ; the ship returned home in May or June 1751, and then

Costs decreed
against a party
who had taken
probate of a
will which she
knew not to be
the last will of
the deceased.

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COURT.**

**By Day after
Trinity-Term,
June 21.**

Mary Robinson had notice of the deceased's death, and that he had made a will of a later date than hers, wherein Martin was executor, who shewed the said last will to two persons whom she sent to him to see it; but Martin said he would burn it, and advised her to prove the will of 5th September 1747; she accordingly on 13th June 1751 proved that will in common form, and swore she believed it to be deceased's last will, and by virtue of that probate received the deceased's wages at the India house, and, as she insisted (but did not make a satisfactory proof thereof,) she retained what was owing to her from the deceased, and paid over the residue to Martin; however, it was certain that she took the probate with the knowledge of Martin. On the 12th June 1754, Martin returned a citation against Mary Robinson to bring in the probate, and shew cause why it should not be revoked, and probate granted to him of the last will. She appeared and denied Martin's will; he propounded and proved it, and she pleaded nothing in opposition to it, and now the question was whether she should be condemned in costs to Martin, who was privy to and advised her to prove the first will.

JUDGMENT — SIR GEORGE LEE.

I was of opinion she ought to be condemned in costs, because she had been guilty of a gross misbehaviour in swearing that the will of 5th September 1747 was the deceased's last will, when she knew he had made a later will, and because she had put Martin to the expence of proving the last will, when she had no objection whatever to make to the validity of it, and therefore had used the privilege the law gave her by being pos-

sessed of a probate, to a bad purpose. I therefore pronounced for the last will, revoked the probate granted to Mary Robinson, and condemned her in costs, and referred the bill to the Register to report thereon.

PREROGATIVE
COURT.
By Day after
Trinity Term,
June 21.

BOXLEY and FRENCH against STUBINGTON.

Caveat Day,
July 28.

Mary, the wife of William Stubington, was empowered by articles executed before her marriage, dated 22nd August 1747, to dispose, by deed or will executed in the presence of, and attested by two witnesses, of one thousand pounds of her fortune after the death of her husband, who was to receive the interest thereof during his life notwithstanding her coverture. She, on the 4th September 1756, accordingly made a will attested by two witnesses, and appointed Boxley and French her executors, and disposed of said 1000 l . to several persons, particularly she gave 500 l . thereof to her niece, the wife of said Boxley, for her separate use, and also bequeathed her wearing apparel, which she had no power to do. The executors propounded the will, which the deceased's husband opposed, and they produced the two subscribing witnesses, who being strangers to the deceased, did not prove identity, and thereupon the executors pleaded that the subscription to the will was the deceased's handwriting.

Administration
cum testamento
anatre of the
will of a mar-
ried woman
made under a
power, granted
to the extent
of that power,
to the person
appointed by
the will.

A general
grant *ceterorum*
bonorum decreed
to the husband.

Witnesses.

1. Joseph Hurst. At desire of Mrs. Boxley, the deponent, who lives opposite to her, went to her house and there found a gentlewoman, a stranger

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COURT.**

**Court Day,
July 26.**

to deponent, who called herself Mary Stubington; the said woman then executed the will propounded in presence of deponent, and William Ward, who was also a neighbour to Boxley; said woman appeared to be perfectly in her senses; and deponent believes she was the deceased in this cause.

Int. William Ward goes now by name of John Fernley.

2. John Fernley, alias W. Ward.—Gives exactly the same account as Hurst; says the person who executed the will was an entire stranger to deponent; verily believes she was the deceased in this cause, and she appeared to be very sensible.

Int. Respondent is a barber in Goodman's fields; deponent went by name of William Ward till lately, when he resumed his real name of John Fernley; deponent 16 years ago took on him the name of William Ward upon a family occasion, which, as it relates only to himself, he does not think proper to tell; his true name is John Fernley; within seven years past he has given several receipts to his customers in the name of William Ward.

3. James Loton.—In 1741 deponent first became acquainted with deceased; he has often seen her write and subscribe her name; verily believes the names "Mary Stubington," subscribed to the will pleaded, are her handwriting.

4. Edward Boxley, Sen.—Deponent is uncle to Boxley, the executor; deponent once saw the deceased write her name; verily believes the names subscribed to the will were written by deceased.

Mr. Stubington, in his answers (which were read), says he never saw his wife, the deceased, write her name "Stubington," but does believe the names "Mary Stubington," subscribed to the will pleaded, were written by her.

Read the marriage articles, dated 22nd August 1747 ; the will pleaded, dated 4th September 1756 ; and a former will, dated 29th September 1752, in which deceased gave to Mary Boxley, her niece, 500*l.*, to be paid to such person as she shall appoint for her trustee, for her separate use exclusive of her husband.

PREROGATIVE COURT.

Cavent Day,
July 28.

Dr. Simpson, for *Stubington*, insisted that there was not a sufficient legal proof of the factum of the will and of the identity of the testatrix ; secondly, that *Boxley* and *French* could not propound it as executors, because the deceased had not power to appoint executors ; and thirdly, that the paper was merely an appointment, and could not be pronounced for as a will. In *Bridgen's* case (a) the

(a) *Bridgen's* case is thus reported in *Strange* :— *Dominus Rex v. Dr. Bettesworth*. Mandamus to grant administration to *Mr. Bridgen*, the late husband of *Lady Bellamont*, deceased. The dean of the Arches returned that a suit had been commenced before him between *Mr. Bridgen* and a son of the deceased, who claimed to be her executor under a will made by her pursuant to a deed executed before marriage, whereby the husband agreed she should have power to make a will, and dispose of her estate, which deed *Mr. Bridgen* had confessed, and thereupon sentence had been given for the validity of the disposition, but not for the executorship created thereby ; and thereupon a new suit was instituted by the daughter against the son and *Mr. Bridgen*, for administration with the will annexed, which is still depending.— 2 *Strange*, 1111.

But a mandamus was granted in *Bridgen's* case in the following year (13 Geo. 2.), on the ground that the husband had not assented to the will, and consequently done no act to exclude himself from the right the law gave him to the administration, although it was admitted that the wife had a separate estate at her own disposal. The case is thus reported :—

Dominus Rex v. Bettesworth. To a mandamus to grant administration to the husband was returned, that the wife's mother having by her will given her several effects for her separate use, exclusive of the husband, and to be by her disposed of, as she should think fit, she had accordingly made a will, whereby she

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COURT.

Caveat Day,
July 28.

whole estate was in the wife's disposal, and therefore a mandamus was refused in the King's Bench; but in *Cullum's* case in B. R., Sir John Strange's Rep. vol. ii. p. 891, a peremptory mandamus was granted to swear the husband administrator; in that case it was agreed by articles before marriage, that the wife might dispose by deed or will of a leasehold estate. She made a will, disposed of said estate, and appointed her mother executrix; the King's Bench held she could not make an executor, that the instrument was an appointment only, and therefore ordered a peremptory mandamus to grant administration to the husband.

JUDGMENT—SIR GEORGE LEE.

I was of opinion that the factum of this will and the identity of the testatrix were fully and sufficiently proved. *Secondly*, that in some cases a feme covert might appoint an executor, as where a power was given her so to do, as was held in the Delegates in the case of *Hopegood* and *Delahay*; (a) but in the present case the testatrix had no

devised her separate estate to trustees, with whom the husband was now litigating the validity thereof in the Ecclesiastical Court; pending which suit the dean of the Arches could not grant administration.

Et per curiam.

This is an insufficient return, for here is no act of the husband to express his assent to her making a will; and she may have choses in action, or other rights, besides what are included in her mother's will: in these cases there must be some act done by the husband to exclude himself; which not being pretended in this case, there must be a peremptory mandamus. 2 Strange, 1118.

(a) *Delahay v. Hopegood*, Delegates, 22d December, 1719. The judges delegates present at the sentence were — Mr. Baron Price, Mr. Justice Dorner, Mr. Justice Eyre, Dr. Pinfold, Dr. Strahan and Dr. Kynaston.

The reader will find all the cases which bear upon this branch of testamentary law, in its several subdivisions, brought to-

such power given her ; however, that the persons named executors had a sufficient interest to propound the paper as a will ; and *thirdly*, that the act done by the deceased was of such a nature that this Court could grant administration with it annexed to the persons named executors. That in *Cullum's* case the wife had power only to dispose of a leasehold estate by will, but she went farther and appointed an executrix, to whom Dr. Bettesworth granted a general probate, notwithstanding there were other effects which she had not a power to dispose of, and notwithstanding Mr. Cullum prayed an administration *cæterorum bonorum*, which the court refused him, and thereby deprived him of the administration of those effects which belonged to him as husband, upon which ground that mandamus was granted. (a) I there-

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Caveat Day,
July 28.

gether in an excellent work very recently published by Mr. E. V. Williams, entitled, *A Treatise on the Law of Executors and Administrators*, Vol. i. p. 39. 211. 633.

(a) The Temporal Court only grants a mandamus where it is clear that the right of the husband to take administration to his wife has been infringed. In other respects it leaves the adjudication of all questions as to the factum and validity of the instrument in the first instance to the Ecclesiastical Courts — holding, that it is the very function of the Court of Probate to decide upon the nature of the instrument, and to say whether or not it is testamentary. So far does the Court of Chancery carry this principle, as to repudiate the idea of an administration taken for the mere purpose of trying a question in the Court of Chancery. In *Rich v. Cockrel* and *Rich v. Hull*, Lord Eldon said, The difficulty here is how to proceed at all ; for as to separate property, there must be a will proved in the Commons. As to the sum of 500*l.* not separate property, there can be no will except with the consent of the husband. A suit was instituted in the Ecclesiastical Court, calling upon the husband to say why administration of the will as to both should not be granted. He litigates as to both, contending as to the second fund that his assent was necessary. Upon that question so depending in the Ecclesiastical Court, there is no decision whatsoever ; but they have

PREROGATIVE
COURT.

—
Caveat Day,
October 12.

fore, in this present case, pronounced for the paper propounded as deceased's will, so far as it was pursuant to the power of disposition given her by the articles, and decreed administration *cum testamento annexo*, limited solely to the 1000/. she had power to dispose of, to Boxley and French as her appointees, and decreed a general administration *caeterorum bonorum* to Mr. Stubington the husband, in case he desired it, and at the motion of his counsel, ordered that the limited administration *cum testamento annexo* should not issue under seal till after fifteen days.

ANONYMOUS.

N. B. Mr. Trenley having propounded a letter as a will, Mr. Smith prayed a commission to take his client's answers, whereupon a question arose, taken administration for the purposes of this suit. No purpose as to this suit can be answered till that question as to her will can be decided in the Ecclesiastical Court. Sir William Scott, whom I have consulted, *thought the proceeding perfectly incomprehensible*. I cannot here decide a question of a married woman as to separate property, unless the will is proved in the Commons: nor as to property not separate without the assent of her husband. 9 Ves. 380.

So in the case of *Hughes v. Turner*, Delegates, 26th November, 1831, where Sir John Nicholl, having already granted probate of one will of a married woman, afterwards granted a special probate of a former will and codicils to one of the executors, *limited only to become a party to, and to attend, supply, substantiate and confirm the proceedings already commenced or intended to be commenced in Chancery*, and the question as to the validity of this special probate was brought by appeal before the Delegates. The Court, composed of Mr. Baron Bayley, Mr. Justice Patteson, Mr. Justice Alderson, Dr. Daubeny, Dr. Philimore and Dr. Blake, were unanimous in reversing that decree; holding, that it was the duty of the Court of Probate to determine which was the last will of the deceased.

at whose expense the letter or will should be sent down to the party who was to answer to it. I was of opinion, and decreed, that it should be sent down at the expence of Mr. Trenley's client, who propounded it, it being part of his allegation, agreeable to the opinion of the court and all the advocates and proctors, 3d November 1735, in the case of *Hogan* and *Hogan*, with respect to exhibits annexed to and pleaded in an allegation.

PREROGATIVE
COURT.

Caveat Day,
October 12.

HUGHES and HUGHES *against* RICARDS, by his
Guardian.

Caveat Day,
October 12.

Dr. Hay, for John and Robert Hughes.—George Ricards died a widower, left only one child John Ricards, who is an infant under seven years of age. Deceased made his will on 17th February 1758, and gave all his estate real and personal, except a few small legacies, to his son directly, without vesting it in trustees. After all the legacies he added these words, “*I constitute and appoint John and Robert Hughes to be trustees of this my last will and testament for my son John Ricards,*” and by the very next clause he appointed his said son his sole executor. The will is duly executed and attested by three witnesses. John and Robert Hughes took administration with the will annexed for the use of the son at Landaff; afterwards finding there were *bona notabilia*, they voluntarily appeared and prayed a monition to transmit the will to this court; caveat was entered here in name of one Jackson; on 27th July 1758, Mr. Rushworth appeared for Mrs. Symmonds, the infant's grandmother, and prayed that she might be assigned guardian to him, which was done, and he then

Administration
cum testamento
annexo decreed
to testamentary
trustees for the
use of the in-
fant executor,
and the next of
kin, till he
should arrive
at legal age to
take probate.

PREROGATIVE
COURT.

Caveat Day,
October 12.

prayed that administration *cum testamento* might be granted to her as guardian for the use of the minor. John and Robert Hughes prayed administration *cum testamento* for the use of the infant might be granted to them as testamentary trustees. The sole question is whether the administration *cum testamento* shall be granted to the trustees or to the guardian.

Dr. Simpson, contra, for the guardian.—Deceased had a considerable real and personal estate in the dioceses of Landaff and Worcester; he left a mother, three brothers, and a sister, who all desire administration may be granted to the guardian. I shall rely on the cases in the Prerogative in 1756, of *Bodicot and Hamilton against Dalzeel* (a), and of *Sir Everard Falkener and Freemantle against Jordan* (b), in both of which cases the court refused to grant administration *cum testamento* to trustees, and decreed it in the first to Miss Dalzeel, who was next of kin and of age, and in the last to the guardian of a minor, who was next of kin, for her use and till she came of age.

Read the act of Court and the will.

Dr. Hay, for Hughes.—The testator's intention is clear, that the Hughes's should manage his estate till his son came to age to take probate.

Dr. Harris, same side.—He cited a case in Prerogative, in 1752, of *Applebee against Applebee*, when the court granted an administration *cum testamento* to a testamentary trustee in preference to a guardian of a minor who had the interest.

Dr. Simpson, contra. — The statute binds the

(a) *Vide supra*, p. 294. (b) *Vide supra*, p. 327.

court to grant the administration to the next of ^{PREROGATIVE} COURT.

—
Caveat Day,
October 12.

Dr. Bettesworth, same side.—The administration must be granted to the next of kin; in this case no trust is created.

JUDGMENT—SIR GEORGE LEE.

I was of opinion the cases of *Bodicot* and *Hamilton* against *Dalzeel*, and of *Sir Everard Falkener* and *Freemantle* against *Jordan* were not parallel to this; in the first, Bodicot and Hamilton had real and personal estates vested in them for particular purposes, and especially as trustees for Miss Dalzeel, who was come of age; there was nothing in the will which implied that the testator intended they should have any testamentary management of his estate, and the daughter being of age, and next of kin, and one of the residuary legatees, was entitled to the administration; likewise in the last case, Sir Everard and Freemantle were made trustees for special purposes, they were also appointed guardians by the father's will, but that will not being executed in presence of two witnesses, pursuant to statute of 12 Car. 2, chap. 24., the appointment of the guardianship being void, they had no testamentary interest, but were mere trustees subject to the Court of Chancery, and the minor having both the beneficial interest, and being next of kin, the administration was granted to her guardian for her use; in the present case, to whichever of the parties the administration should be granted it would virtually be granted to the next of kin, for none of them had any title in themselves, but must take for the use and during the minority of the infant, who was executor and next

PREROGATIVE
COURT.

Cavest Day,
October 12.

of kin ; here was no estate whatever vested in the trustees, for all was given directly to the infant ; the testator must therefore intend there should be trustees for the testamentary management of his estate for his son during his minority, otherwise they would be trustees without any trust, and such an appointment would be nugatory. I thought the testator intended the Hughes's should have the management of his estate till his son came to age to take probate ; I therefore decreed administration *cum testamento* to John and Robert Hughes as testamentary trustees for the use of the infant executor and next of kin, till he should arrive at legal age to take probate, but at the desire of Mr. Rushworth, ordered that the administration should not go under seal till after fifteen days.

Michaelmas
Term,
November 15.

A commission
of appraisement
decreed at the
suit of a resid-
uary legatee.

BEEBEE *against* BEEBEE.

William Beebee died, left a widow and children ; the widow, Frances Beebee claims under a will which is not yet propounded. William Beebee, deceased's son, opposes it. By the will the testator left his household goods and residue of his estate to his children, his money in the stocks and twenty pounds to his wife, and made her executrix. The son's proctor on 23d July 1758, prayed a commission of appraisement, the widow's proctor opposed it, and on 1st September she gave in an inventory on oath, without any assignation of the court. The question was, whether a commission of appraisement should be decreed or not.

JUDGMENT—SIR GEORGE LEE.

I was of opinion to decree it, because it ap-

peared there were several outstanding debts which it concerned the residuary legatees to have a particular account of; and because the expences of the commission must go out of the residue, and so must be paid by those who desired it, and the widow would not be burthened thereby.—I decreed a commission of appraisement.

PREROGATIVE COURT.

Michaelmas
Term,
November 15.

ALFRAY against ALFRAY.

2d Session
Michaelmas
Term,

November 15.
An article in an
allegation in an
interest cause
directed to be
reformed on ac-
count of its ge-
nerality.

Robert Alfray died intestate, leaving Mary, who claims to be his widow, and a son by her, named Richard Alfray, he had also two other children by her, who died before him, and John and Euclid Alfray, and Elizabeth Wright his children by a former wife. Mary, as widow, prayed administration, the three children by the first wife entered caveat and denied her interest. She propounded it and gave an allegation, pleading in first article a courtship in 1741 and 1742, and that they were married in or about the month of November 1742, by a priest in holy orders, according to the rites of the church of England, at a house in the liberty of the Fleet, in the presence of several credible witnesses; the rest of the allegation pleaded the baptisms of the children which she had by deceased as legitimate, constant owning of her as deceased's wife by him, and by the parties in the cause, and several letters from the deceased to her, in all of which he styled himself her husband.

Dr. Hay for the children, objected only to the first article, that both the courtship and marriage were pleaded too generally.

PREROGATIVE
COURT.
Michælmas
Term,
November 15.

JUDGMENT — SIR GEORGE LEE.

I was of opinion that as the facts pleaded in the first article were matters within her knowledge, she ought to specify the places where he courted her, that it might appear whether it was a public, reputable courtship, or a private clandestine one, and that she ought at least to confine the time of her marriage to the month of November 1742; but as to her specifying the particular house where they were married, it might be impossible for her to do it at this distance of time, considering that there were formerly a great number of houses within the liberty of the Fleet where marriages were performed, and according I admitted the allegation specifying the places where deceased courted her, and confining the time of the marriage within the month of November 1742.

ARCHES COURT OF CANTERBURY.

4th Session
Hilary Term,
December 1.

BRETELL *against* WILMOT and KING.

(*Appeal from Consistory of London.*)

In a debate on the admissibility of a libel in a cause of subtraction of church-rate, the Court can take notice of nothing that is not expressly pleaded, or referred to, in the libel.

If a rate is made only for the repairs of a church, it is illegal to raise more than is wanted for that purpose.

In the vacation after Hilary Term 1758, John Wilmot and William King, then and now churchwardens of Hornsey, in Middlesex, took out citation against John Brettell in a cause of subtraction of rate; in Easter Term Mr. Stevens appeared for Brettell, and Mr. Skelton, for the churchwardens gave in a libel, pleading that in 1756 the church of Hornsey was very much out

of repair; that on 29th September 1756, after due notice for that purpose, a vestry was held, when it was unanimously agreed the church should be repaired. The repairs were begun in April 1757, and on 20th October 1757 the parishioners met in vestry after due notice, and made a rate of 2s. 4d. in the pound upon all houses and lands in the parish to pay the workmen's bills, which rate amounted to 612*l.* 16*s.*; that Brettell lives in a house for which he pays 32*l.* a-year, and that he is duly and equally rated at 3*l.* 14*s.* 8*d.* *N. B.* The rate is annexed to the libel, wherein it appears that he is rated 1*l.* 8*s.* for his house, and 2*l.* 6*s.* 8*d.* for his lands, called Bath lands, which he had in the parish, making together 3*l.* 14*s.* 8*d.*

The admissibility of this libel was debated in the Consistory Court of London on 3d June 1758, when the chancellor admitted it, from which Brettell appealed to the Arches. Brettell's counsel admitted that he was not unequally assessed, but insisted that the rate was illegal, because it was made without any estimate of what the repairs would amount to: that on 20th October 1757, when the rate was made, the vestry knowingly made a rate for the repairs amounting to a greater sum than the workmen's bills came to, for the bills were then before the vestry as appears by the vestry act of that day, which is referred to in the libel, and there it appears that the bills came only to 511*l.* 11*s.* 3*d.*; but this rate is for 612*l.* 16*s.*; that by subsequent orders the bills were referred to a surveyor who reduced them to 453*l.* 5*s.* 0*1/4d.*; and on 4th January 1758 the vestry appointed a committee to settle the bills and *adjust a rate*, whereby they had departed from the rate of 20th October 1757.

ARCHES
COURT.

Hilary Term,
December 1.

ARCHES
COURT.

Hilary Term,
December 1.

JUDGMENT—SIR GEORGE LEE.

But I was of opinion the Chancellor of London had done right in admitting the libel; for upon debate of the admissibility of the libel, the Court could take notice of nothing but what was either expressly mentioned therein or referred to by it; all the acts of vestry therefore, except that of 20th October 1757 to which the libel referred, were out of the present question, and might be matter of plea for Mr. Brettell hereafter; and as to the grand objection, that this rate (which is annexed to and made part of the libel) was for a greater sum of money than was wanted, it was *gratis dictum*, for at the head of the rate it was said to be made to pay for the repairs of the church and for other disbursements of the churchwardens in their office; I therefore remitted the cause and condemned Brettell in 10*l.* costs; but I said, if it should appear that this rate was made only for repairs of the church, I should be clearly of opinion it was illegal to raise so much more than was wanted; and therefore in that case, it would be most adviseable for the churchwardens to drop this rate and suit, and to get a new rate made for the sum really wanted; and as to an estimate, it would have been proper before the repairs were made, but the work was done before the rate was made, and the rate was now grounded (so far as concerns these repairs) on the workmen's bills. It was said the churchwardens had brought suits against twelve other parishioners upon the same rate.

PREROGATIVE
COURT.

PREROGATIVE COURT OF CANTERBURY.

By Day after
Michaelmas
Term,
December 13.RAYMOND *against* BARON VON WATTEVILLE.

Dr. Hay, for Raymond.—Dinah de Larish, formerly Raymond, an English woman by birth, married in Germany, and died at Hernhutt in Lusatia, a widow, without children, on 25th May 1756, she left Jones Raymond, Esq. her brother, and one of her next of kin, made her will (as said) on 26th April 1756, and appointed Baron Von Watteville, a principal man at Hernhutt, and one of the heads of the Moravians, executor and universal legatee; and afterwards she being sick in bed sent for the judge and officers of the court at Hernhutt to come to her, before whom (as asserted) she recognized her will, and desired them to enter and deposit it in the Court, which they did. 1st June 1756 an inventory was taken of her effects, and deposited in the court at Hernhutt. On 9th August 1756 Watteville took probate of the will in the Prerogative Court by commission, and the next day his agent gave notice to Mr. Raymond of his sister's death. On 25th September 1756, Raymond cited Watteville to bring in the probate, to prove the will by witnesses, and exhibit an inventory. On 11th November 1756, an absolute appearance was given for Watteville. On 11th December 1756, Crespigny, for Raymond, opposed the will, Fountain propounded it, and gave an allegation. On 25th February and 23rd May 1757, at Fountain's petition, requisitions were decreed to examine witnesses and take inventory, returnable on 23rd November

It is not competent to the Prerogative Court to require an inventory of a personal estate situated in Germany.

A proctor is not obliged to answer to the seal of a foreign court, or to subscriptions and seals of a foreign notary, for the law cannot presume him to be coauthor of them.

PREROGATIVE
COURT.
By Day after
Michaelmas
Term,
December 18.

1757. Inventory was then brought in of deceased's effects in England, at the end whereof there was a declaration that the inventory of the German effects was in the court at Hernhutt; Crespigny objected to the inventory generally as not full; Fountain prayed a new requisition for a fuller inventory, which was decreed on 10th December 1757, returnable in February 1758, this was not taken out; but a new one was prayed and extracted in May 1758, which has been expected but is not returned. On 7th September 1758 Watteville was decreed to be excommunicated for not exhibiting a fuller inventory, and a schedule was signed; on 14th February 1758, Fountain brought in an inventory without the requisition, but signed by Watteville and attested by an imperial notary; this also contains only the English effects, and does not refer to the German inventory as the first did; Crespigny therefore prayed the court to pronounce that Watteville was still in contempt, and that the excommunication might pass under seal; on 21st June 1758 a requisition for examining witnesses was taken out, but not returned; Fountain produced one witness in this court, but has not examined him; he has now exhibited notarial acts and instruments said to be under seal of the court at Hernhutt, and prays Mr. Crespigny's answer to them, which we oppose.

Dr. Simpson, for Von Watteville. — The questions are, whether the inventory is not full; whether Watteville is duly decreed to be excommunicated, and whether Crespigny shall not answer to the notarial acts, &c. The last requisition was not taken out for the examining of witnesses, because the Court at Hernhutt would not examine

under a commission from this court. On 11th December 1756, inventories were decreed on both sides. On 23rd November 1757 a requisition with an inventory was brought in by Fountain, it only contains the effects in England. Fountain prayed a new requisition, because the word *all* was omitted at the head, not because the German effects were omitted ; that requisition was expected till 1st Session Easter 1758, and that day Fountain prayed to be heard on his petition. On 4th Session a new requisition was decreed returnable on 28th July 1758 ; on that day Fountain brought in several exhibits to excuse Watteville. On 7th September 1758, Watteville was decreed to be excommunicated. On 14th September 1758, Fountain brought in an inventory, which by affidavit appeared to have been just received, but without the requisition ; however, it is authenticated by an imperial notary ; the excommunication not being under seal, Watteville is not in contempt. On 2nd Session Michaelmas Term, Fountain brought in several acts, and then no objection was made that his client was in contempt : by way of return of the requisition for witnesses, and in supply of proof of his allegation and the will, Fountain exhibited several acts of Court at Hernhutt. 1. Dated 8th August 1758, certifies that Watteville has sworn to the inventory and as to the legality of the will, and insists that this court cannot determine on effects in Germany, and that judges are not to be examined as to the legality of their judgments. 2. A certificate by an imperial notary and two other witnesses, attesting Watteville's declaration of the effects in England. 3. Notarial certificate of a copy of the will, and that three witnesses had sworn before him as to deceased's sanity, and that

PREROGATIVE
COURT.
By-Day after
Michaelmas
Term,
December 18.

PREROGATIVE
COURT.

By-Day after
Michaelmas
Term,
December 19.

she had recognised the will in their presence.
4. Certificate under the hand of the judge at Garlitz certifying that the court at Hernhutt is legally established, and has supreme authority. We pray the proctor's answers to these exhibits ; the inventory exhibited on 14th September 1758 is full ; he is not obliged to set forth the German effects, because this court has no jurisdiction over them. Prerogative, 7th June 1735, *Ann Colman*, a native of Dantzig died there, leaving effects there and in England ; her grand daughters who resided in England prayed an inventory of all her effects ; the Court refused as to the effects at Dantwick. Prerog. 1739, *Lord Daer* against *Duke Hamilton*, Court refused to order a paper to be inspected upon a commission of inspection which related to an estate in France ; objection is made that the requisition is not returned ; in foreign transactions this Court takes such returns as can be had ; a supreme court has attested that Watteville signed the inventory brought in, on 14th September, and made affirmation of the truth of it in foreign commissions. The substance and not form is to be regarded, Arches 1730, *Elstrand* against *Gatcliffe*.

JUDGMENT—SIR GEORGE LEE.

I was clearly of opinion this Court has no jurisdiction over the German estate, and could not require a constat thereof ; so adjudged, Prerogative, 1728, *Ployart* against *de Smith*, (a) and again in

(a) Prerog. 4th sessione Paschee, 1728.—*Ployart v. De Smith*. De Smith, brother and administrator of Raymond De Smith, deceased, was also administrator of several brothers and sisters who died abroad, and part of whose estates lay in the several countries where they died ; the said administrator had not accounted with Raymond, the deceased in this cause, for his share in the dis-

1737, *Wilson* against *Ogle*, as to effects lying in the province of York and in Ireland, and consequently that the inventory was full; and as to the requisition not being returned, the case of *Elstrand* and *Gatcliffe* is in point, that forms are not to be insisted on, in foreign transactions; I therefore was of opinion that *Watteville* had purged his contempt by exhibiting the inventory on 14th September; and rejected Mr. *Crespigny*'s petition, and ordered the excommunication not to pass under seal. As to *Fountain*'s prayer, that *Crespigny*, as proctor, should answer to the seal of the Court at *Hernhutt*, and to the notarial seals and subscriptions, &c., I likewise rejected that, being of opinion that a proctor is not obliged to answer to foreign seals and to the subscriptions and seals of foreign notaries, the rule of a proctor's answering extending only to the seals of courts in England, and to the seals and subscriptions of English notaries, with which the law supposes him to be acquainted, but does not suppose him to be acquainted with the seals of all the courts and notaries in the world.

PREROGATIVE COURT.
By-Day after
Michaelmas
Term,
December 18.

tribution of the said estates. Mr. *Ployart*, nephew of the deceased *Raymond*, called the administrators to an inventory and account in the Prerogative, and gave in an allegation setting forth, that the administrator was indebted to the estate of *Raymond* for the several shares of the foreign estates which came to him by the death of the said brothers and sisters, and prayed that he might be obliged to make discovery of them, and charge himself with them in his account.

The court was of opinion that the foreign estates were subject to the laws there, and were out of his jurisdiction and cognizance, and therefore would admit no articles of the allegation that related to the foreign estates, because a discovery of them was only to lead a distribution, which he had no authority to direct, and the laws there with regard to intestates' estates, might be very different from what they are here.—(MS. Cases of Sir *George Lee*.)

PREROGATIVE
COURT.

By Day after
Michaelmas
Term,
December 18.

In a case of intestacy, an application that the parties entitled in distribution should give security to repay the proportions they had received in the event of a will being found, rejected.

COZZENS *against* HELYAR.

Robert Helyar, Esq., deceased, made his will, dated 12th February 1734, appointed his nephew executor, who pleaded the same and prayed probate. Johanna Helyar, deceased's sister, opposed and proved, that the deceased made a latter will on 17th December 1745, wherein she was executrix and residuary legatee, but that latter will did not appear in being, in 1754. I pronounced that the latter will, though not produced, (a) did not revoke the former, and that deceased, so far as appeared, was dead intestate. William Helyar, the nephew, appealed to the Delegates, (b) who confirmed my sentence, and I granted administration to deceased's sister; she gave bond with sureties in 40,000*l.* with a covenant thereon to bring in the administration if a will should appear; she being now ready to distribute 10,000*l.*, her proctor, Mr. Major, prayed that the persons entitled to distribution should give security to repay to her the proportion they had received, in case a will should hereafter appear; Cozens, who was entitled to distribution, opposed that motion, the common bond being only to refund, if latent debts should hereafter appear.

JUDGMENT — SIR GEORGE LEE.

I observed that the particular covenant in her bond, to bring in the administration in case a will should appear, did arise from the particularity of

(a) Vol. 1. p. 472.

(b) Vol. 1. p. 514, notes. 4 Burr. 2513. 1 Phill. 427.

the case, upon which account the oath, as ~~ad-
ministratrix~~, had by order of the Court been par-
ticularly adapted to her case, as she could not
swear absolutely that deceased died without a
will; but there was nothing uncommon in the
case of the persons entitled to distribution, to in-
duce the Court to oblige them to give bond with
an unusual covenant; I therefore rejected Major's
petition.

PREROGATIVE
COURT.

By-Day after
Michaelmas
Term,
December 13.

SMITH *against* CROFTS.

By-Day after
Michaelmas
Term,
December 13.

A substituted
executor cannot
propound a will
till the person
first named as
executor has
been cited to
accept or refuse
letters of admi-
nistration.

William Farrington, a soldier and pensioner of Chelsea hospital, on 14th June 1746 (being at that time porter to Sir Robert Rich) made his will, and appointed Elizabeth Wilson, now Smith, his residuary legatee, and appointed his executor in these words: "*I appoint my honoured master sole executor, and if he will not accept it, I make my god-daughter, Elizabeth Wilson, my executor.*" He delivered this will to Wilson, now Smith, and directed on the back thereof that it should be opened in the presence of Sir Robert Rich. The deceased died in January 1755. On 10th February 1755, Elizabeth Hewitt, claiming to be his sister, took administration to him as dying intestate. Smith did not hear of his death for some time, but as soon as she did, she carried the will to Sir Robert, who said he would not concern himself with it. On the 10th October 1756, Smith cited Hewitt to bring in the administration, &c. She was personally served, and soon after died, but made her will, and appointed Jane Crofts, her daughter, executrix. Smith cited

**PREROGATIVE
COURT.**

**By-Day after
Michaelmas
Term,
December 18.**

Crofts to the same purpose. Cheslyn, proctor for Crofts, declared he should oppose the will, but prayed that Sir Robert Rich might be cited to exhibit scripts and scrolls, and to declare whether he would act as executor before any thing should be done at the petition of Smith. Smith prayed that she might be at liberty to propound the will without being at the expence of citing Sir Robert Rich.

N. B. Crofts took administration *de bonis cum testamento* to Farrington.

JUDGMENT — SIR GEORGE LEE.

Smith being only a substituted executor in case Sir Robert would not accept the executorship, I was of opinion she could not propound the will till she had cited Sir Robert to accept or refuse, and decreed accordingly.

**By-Day after
Michaelmas
Term,
December 18.**

**Time allowed to
an agent acting
under a power
of attorney to
plead and answer
in an interest
cause, the prin-
cipal residing in
Jamaica.**

LIEBENROOD *against* LAMSON.

Thomas Lamson, deceased, made his will dated 20th December 1733, appointed Richard Wilson, who resides at Jamaica, sole executor; in October 1757 he proved the will at Jamaica, where the deceased lived and died. Wilson, by the recommendation of Livingstone, a merchant at Jamaica, appointed Mr. Liebenrood, who was a stranger to him, to collect the deceased's effects in England, and sent him a letter of attorney to take administration with an authentic copy of the will annexed, for his use and benefit. Liebenrood accordingly

prayed such administration. Cheslyn appeared for one Lamson, and alleged him to be brother to the deceased ; declared he would oppose the will, and prayed that Liebenrood's proctor might answer to his interest. Mr. Liebenrood made affidavit that he was a stranger to the deceased's family, and could not answer to Lamson's interest, or plead, till he had sent to Jamaica for information, because he does not know whether the witnesses to the will are alive or dead.

PREROGATIVE COURT.
By-Day after Michaelmas Term, December 18.

I allowed Mr. Liebenrood time to plead, and to answer, till the last session of Trinity Term 1759.

CHITTENDEN *against* KNIGHT.

By-Day after Michaelmas Term, December 18.

Margaret Chittenden died intestate ; her son, John Chittenden, and her daughter, Juliana Knight, the wife of William Knight, both prayed administration. Knight, to divest the son, J. Chittenden, of the preference which by the practice of the Court he has, exhibited an affidavit that the next day after deceased's burial, he took possession of deceased's effects, had an inventory made of them, and delivered them without any authority to a broker, who sold them to the best bidder at a public auction.

Administration decreed to a son in preference to a married daughter, although there was an affidavit from the daughter to show that the son had intermeddled in the effects without competent authority.

I decreed administration to the son.

PREROGATIVE
COURT.

By Day after
Michaelmas
Term,
December 18.

Administration
granted to a
daughter in pre-
ference to a
widow who had
by her marriage
settlement bar-
red herself of
all interest in
her husband's
property.

Court of Pre-
rogative cannot
assign a guar-
dian to an in-
fant *in ventre de*
sa mère.

WALKER *against* CARLESS.

Robert Carless, Esq. died intestate, left Mary Carless, his widow with child, and a daughter, Ann Walker, each of whom prayed administration. The widow by marriage settlement had barred herself of dower and of all interest in her husband's personal estate; her counsel insisted that she was, notwithstanding, entitled to administration as widow, and also as natural guardian to her child, who, though as yet he was *in ventre de sa mère*, was considered in law as born, for all beneficiary purposes.

JUDGMENT—SIR GEORGE LEE.

I was of opinion I could only grant it to her as widow, for I could not assign her guardian to a child unborn; it would be well granted to her as widow under the statute of H. 8.; but as she had barred herself of all real interest in deceased's estate, she would be only a trustee, and I therefore thought (since it was in the discretion of the Court to grant it to either) that it was most proper to grant it to the daughter, who had an interest immediate in the estate; I accordingly decreed the administration to Ann Walker, first exhibiting an inventory, and giving security to the full value of the inventory, and notice of the sureties.

APPENDIX.

PRÆROGATIVA, TERM. TRIN. 1726.

DR. BETTESWORTH, *Judge.*

LLOYD *contra* BEATNIFFE, *alias* SMITH.

Lloyd, a creditor, called Beatniffe, the executrix of her deceased husband, to give in an inventory of his effects in the Prerogative Court. She alleged, that she had already given in an inventory in Chancery; but it appearing that Lloyd had not been a party to the Chancery cause, and that he was not privy to any of the proceedings there, the Court was of opinion, that though one creditor had proceeded in Chancery, the other might proceed in the Prerogative Court, and therefore ordered the executrix to bring in the inventory.

Although one creditor may proceed against an executor in the Court of Chancery, another may sue him in the Ecclesiastical Court.

PREROG. TERTIA SESS. HIL. FEB. 6to.

DR. BETTESWORTH, *Judge.*

GROVE *contra* ADDIS.

Edmund Addis died a widower; made his will, but no executors, nor any disposition of the residue. Barnard, his son, took administration with the will

Objections to an inventory must be specified in an allegation.

annexed. Grove, a sister, called for an inventory, in order to distribution, which was given in.

Grove excepted to the inventory; and in the act set forth that it was neither full nor plain. It was objected, on the other side, that exceptions to an inventory ought to be specific; that it did not appear, from the act, what the objections were, and therefore Addis could not defend himself.

The Court ordered Grove to specify her objections in an allegation.

PRÆROG. DIES EXTRAORDINAR. POST TERM.
HIL. Mar. 9, 1727.

HEATH v. HEATH.

An assignation
for fuller an-
swers enforced
after publica-
tion.

An allegation was admitted, and the personal answers of the opposite party decreed and given in.

The adverse proctor alleged, they were not full.

The judge assigned to hear his pleasure in *proximum*.

On that day nothing was done; nor did the proctor pray his assignation to be continued.

A court day or two after, the publication of the depositions on that allegation was prayed; and at the same time fuller answers. No exception was taken at that time, that the assignation for fuller answers was dropped; but after the term probatory was expired, and publication had passed, the proctor who had prayed fuller answers, proceeded to make his exceptions. It was objected that it was now too late, and that he had waived his assignation by having discontinued it one court day.

Per Curiam.

The objection that the assignation had been dropped, ought to have been taken before. The Court assigned a second time, upon fuller answers. Though publication is passed, yet, since an assignation for fuller answers was made before publication, and has been continued to this time, we are at liberty to proceed.

HERRIDGE contra BRANSBY.

This case in Chancery was mentioned by *Mr. Lutwyche*, in the cause of *Powis v. Andrews*. (a) Lord Chancellor Macclesfield, on pretence that a will had been obtained by fraud and imposition, decreed it to be void as to real estate therein devised, and declared that Herridge, the executor of the will, should, as to personal estate, be a trustee only to the use of the deceased's father.

The Lord Chancellor has no jurisdiction to set aside a will.

Herridge appealed to the House of Lords, who were of opinion that the Chancellor had no power to appoint the executor to be as a trustee, and that it was a novel invention, without any colour or foundation, and reversed the decree, in every part of it, by which the will stood, and the executor was re-established, as sued.

PRÆROG. TERTIA SESS. PASCHÆ, May 22, 1728.

DR. BETTESWORTH, Judge.

KELLER contra BEVOIR.

Mrs. Bevoir, a femme covert, made her will, and appointed Keller executor and residuary leg-

The power of
femme covert to
make a will, es-
tablished.

(a) Vide Vol. I. p. 251.

gatee. Her husband opposed it, and alleged she had no power to make a will. The executor pleaded her marriage articles, by which she was empowered, notwithstanding her coverture, to dispose of her estate real in her life-time absolutely, and as if she had been *sole*, but no express mention of disposal by will. The estate was vested in trust to her use, and subject to her control; and it was provided, that if she died without any disposal, leaving children, the trustees should be seised to their own use; and in case of no children, nor disposal to the use of the surviving husband; and in case she survived her husband, and died without children, and without disposal of the estate, that the trustees should be seised to the use of her executors, &c.

The question was, whether, under these articles, she had power to dispose by will.

It was insisted, that she had power only to dispose by deed in her life-time, and not by will, which could not take effect till she was dead; and that it was not intended she should dispose by will, appears from the clause in the articles, by which it is provided that in case she made no disposition, the trustees should be seised to the use of her executors, which would have been absurd if she could by her will have disposed of it to her executors.

Per Curiam.

The clause gives her an absolute power of disposal in her life-time; but that cannot be understood to mean that she should have no power of disposal, unless she would divest herself in her life-time.

She has power of disposal, as if she was *sole*,

and a *femme sole* may certainly make a will. The clause giving it to her executors regards her surviving, and is to be taken in this manner:—that if she should dispose by will of any other estate she should have, without disposing of this trust-estate, that then, notwithstanding this neglect of devising, the trust-estate should go to such executors as she had appointed, &c.

And therefore I am opinion she has a power of making her will by the marriage articles, notwithstanding her coverture.

CONSIST. LOND., QUARTA SESSIONE PASCHÆ,
June 4, 1728.

THE BISHOP OF LONDON, *Judge.*

Officium Domini promotum per
PAWLET v. HEAD. (a)

Articles were promoted by Pawlet against Mr. Head, Rector of Bardwell in Essex, for sodomitical practices, in attempting to commit sodomy with several of the boys belonging to the school at Bishops Stortford, whereof he was usher. It appeared that there was a public fame and voice in the neighbourhood that he had made such attempts, and that he had thereupon absconded for some time: but the only witness against him, as to the fact, was a gentleman whose son was at the same school, and who had been attempted by Head.

He deposed that his son told him, Head had

An incombent suspended, ab officio et beneficio, for immoral practices.

(a) This case of Pawlet *v.* Head, was much referred to in the case of Watson *v.* Thorp, 1 Phill. 273, 277.

attempted to commit sodomy with him, and told him all the circumstances of such attempt, to which he deposed and swore, that, after such information from his son, he met the said Head at Garraway's Coffee-house, in Exchange-alley, and charged him with the fact, who seemed under great confusion, and then confessed that he had made such attempt; and further deposed, that one Mr. Meriton, since deceased, told this deponent that his (Meriton's) son had stated that Head had also attempted to commit the same crime with him. The children on whom the attempts had been made, were not above nine or ten years of age, and therefore could not be examined.

Upon the whole, the Bishop was of opinion, enough was proved against him to subject him to some punishment, and decreed him to be suspended, *ab officio et beneficio*, for three years from the date of the suspension, and gave 30*l.* costs against him.

CONSIST. LOND. EODEM. DIE.

An incumbent suspended, *ab officio et beneficio*, for non-residence.

Another cause was promoted against Head, for non-residence. It appeared that a monition had been sent to Head to reside on his living, and to certify, by a certain day, that he was resident.

Head left a certificate in the office before that day; but took no care to exhibit it in Court, so that it came not to the knowledge of the judge.

He was then cited to shew cause why he should not be deprived for not obeying the bishop's monition; and, on his non-appearance, was sus-

pended, and then excommunicated and outlawed.

The Court was proceeding to deprive him. He appeared, and prayed absolution; and, on taking the usual oath, he was absolved; but the Court was of opinion that, since he had not made a proper return to the monition, the proof lay upon him to shew that he had obeyed it, and had been resident on his living.

The evidence for him proved that, after the monition, he had been in his parish, and performed divine service there several times, for several weeks together, but did not prove a constant, uninterrupted habitancy there.

On the other hand it appeared that, during the time of his suspension which was about a year, he had been absent; and that while he was in the parish he had resided in his rectorial house. It was confessed that he had been non-resident before the monition; but the counsel for him insisted that he could not be punished by the bishop for non-residence, till he had been admonished to reside, which was agreed to by the counsel on the other side; so that all that time was out of the question. The counsel for him further insisted, that residence during the suspension was not necessary, and that there was no proof of his non-residence since the monition except during that time. On the other hand it was insisted, that a parson is bound to residence, even during a suspension, to keep hospitality; that it lay on him to prove that he had been resident, which he had failed to do; and insisted that, by law, an inhabitancy in the parish, but not in the rectorial house, was no residence.

The case of *Butler* and *Goodall*, 6 Coke, 21; *Moore*, 440; *Goldsborough*, 659.

The bishop was of opinion that he had not proved his residence, and decreed him to be suspended for that offence for one year, to commence from the expiration of the three years' suspension for the other offence, and that this suspension should be also *ab officio et beneficio*, and condemned him in 20*l.* costs in this case.

N.B.—Head, in order to defeat the suspension, took up money of the farmer of his tithes, that there might be nothing due for the sequestrator to take possession of, but the Court decreed that the sequestrator should take the tithes in kind, and decreed a monition to the farmer to levy them in such manner.

ARCHES QUARTA SESSIONE PASCHÆ, May 28,
1728.

DR. BETTESWORTH, *Judge*.

JONES *contra* YARNOLD.

An allegation admitted, which had been rejected by the Court below. Witnesses cannot be examined *viva voce* in the Ecclesiastical Courts.

Lady Morgan died intestate; Jones, as son and next of kin, obtained administration. Yarnold cited him to shew cause why it should not be revoked, and alleged that he was husband to the deceased; the Court below examined witnesses to the marriage *viva voce*; Jones gave in an allegation exceptive to their credit and reputation; the Judge below was of opinion the allegation came too late, the evidence being known; and also that it was

not relevant, and so rejected it ; and then *finaliter interloquendo* decreed administration to Yarnold.

The Proctor for Jones on the same day, soon after the allegation was rejected, made some prayer, and then appealed *ad statim* from a grievance in rejecting it, *scilicet* the allegation ; it was insisted that the appeal could not lye, because the proctor had made a prayer before the same Judge after a grievance done, and that the allegation was properly rejected, because it was not given in till the depositions were published ; and likewise that an appeal from a grievance must be *in scriptis*, and, therefore, this being *ad statim*, was null. On the other side it was said that the whole proceedings were irregular and null, and that the evidence being *viva voce* they could not except to the witnesses till after publication, that the prayer of the proctor was at the same instant that the grievance was done, and that the appeal was from all the proceedings ; but it appeared that the cause had all along been set out in the Arches as an appeal from a grievance only.

Per Curiam.

All the proceedings have been very irregular, but as the appeal is only from a grievance, I can take notice of nothing else. The prayer of the proctor was immediately after the rejection of the allegation, and, therefore, was not an acquiescence in the Judge in such manner as it would have been if time had intervened. The Court having examined the witnesses *viva voce*, as soon as they were produced, the appellant had no opportunities of excepting before publication as it is called.

I am of opinion that the allegation is relevant, and that a grievance has been done the appellant.

The Court having pronounced *pro voce appellationis*, the proctors on both sides agreed to begin the cause *de novo* in the Arches.

ARCHES, DIE EXTRAORDINAR. POST TERM.
MICH. 1728.

DR. BETTESWORTH, *Judge.*

JONES *contra* YARNOLD.

A party who had possessed himself of a portion of the goods of a deceased person, before he had proved his title to the administration, directed to give security for the safety of those effects.

On this day *Dr. Strahan* informed the Court that Yarnold as husband (though the question whether he is such or not, is still depending, and though he was not authorised by any letters of administration) had possessed himself of plate, money, notes, and bonds of the deceased to the value of 800*l.*, and moved for a decree against him to bring them into court.

Dr. Henchman, contra, said it was very unusual for money to be decreed into court, unless some misfeasance was shewn or alleged against him in possession, which had not been pretended in this case; and that he had possessed himself of them under the semblance at least of being the husband.

Per Curiam.

He is not in possession by legal title by administration; on the other hand, no necessity appears for the Court to decree the money to be brought in; but it may be very proper that he should give such security for the safety of the effects as the Court shall approve, which was accordingly decreed.

PREROG. CUR., QUARTA SESSIONE, MICH. 1728.

Upon debate of an allegation, *Dr. Paul* quoted the following case, which was determined by the delegates at Sergeants' Inn.

A. made his will, and appointed B. his executor, and by deed gave part of his estate to C.; C. obtained in the Prerogative a limited administration to the deed only. The executor appealed from the grant of this administration. The Judges' delegates were of opinion that an executor being *universi juris hæres* to his testator, no administration of any sort could be granted; but, that where there is no executor two administrations may well subsist together. The case of *Sir George Coswall v. Morgan*.

CONSIST. LOND., TERTIA SESSIONE, MICH.

Novembris 15mo, 1728.

DR. HENCHMAN, *Judge.*

ANDREW v. RAYMOND.

In a suit for tithes an article of an allegation was offered to the Court, referring to an old terrier made 106 years before. It was objected that the terrier was not legally and duly made, that the article referring to that which could be no evidence, could not be relevant.

A terrier may be pleaded in an allegation in a tithe cause.

Per Curiam.

The terrier has ever since been deposited in the Archives of the Court; it is to be presumed that

APPENDIX.

every instrument received and filed in a public office, was legally made, and it cannot be called in question without impeaching the credit of the public Archives, and therefore the article referring to this terrier is admissible.

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ARCHES, 11mo DIE NOVEMBRIS, 1730.

Coram Dr. BETTESWORTH, Decano.

WORSLEY, *Mulier, contrâ WORSLEY, Virum.* (a)

After a reconciliation fresh acts of cruelty will revive acts of cruelty, and also of adultery.

In this case several facts of cruelty and adultery were charged by the wife in an allegation offered by her, which were laid to have been committed some years ago. Since that there had been a reconciliation between the husband and wife; and since that reconciliation he was charged in this allegation with fresh facts of cruelty, but with no new fact of adultery.

Dr. Cottrell, for the husband, said that since he was charged with fresh acts of cruelty since the reconciliation, they would indeed revive the former acts of cruelty before the reconciliation; but that since no new acts of adultery were pretended, the former acts of that kind did not come within the rule, and that therefore all the articles of the allegation relating to the adultery were irrelevant, and ought to be struck out.

The Court held clearly that new acts of cruelty would revive the whole, as well the acts of adul-

(a) Cited by Sir John Nicholl, in *Durant v. Durant*, 1 Hag. 734, 766. See also notes, 767, *ibid.*

tery that were committed before the reconciliation (though there were no new acts of this sort) as the acts of cruelty, and that she was now as much at liberty to charge him with these acts of adultery, notwithstanding the reconciliation, as she would have been if there had been no reconciliation at all.

**PREROGATIVA, TERTIA SESSIONE PASCHÆ,
May 22, 1728.**

Dr. BETTESWORTH, *Judge.*

ELWES *versus* ELWES.

Colonel Raleigh appointed Sir W. Dodwell executor of his will, and *inter alia* gave a legacy to the eldest son of Captain Elwes, and a legacy of 500*l.* to William, the third son of the said Captain, and then devised all the rest and residue of his estate to the younger children of the said Captain Elwes, share and share alike, excepting the said William Elwes whom he had particularly provided for by the said specific legacy of 500*l.*, and directed that his executor should in trust for the said children, sell certain houses, and lay out the money arising therefrom, and all the rest and residue in government or other securities, and that the interest and produce thereof should be expended in the maintenance and education of the children during their minority, and that their shares in the residue should be paid to each of them at their respective ages of twenty-one years, or days of marriage, and in case any of them died under

In cases of administration, the constant rule is, to grant the administration to the greater interest.

the said age of twenty-one, and unmarried, then that the share of that child so dying should go to the survivor, or survivors. The executor released, and administration with the will annexed was granted to Captain Elwes for the use of the minors *durante minore aetate* to whom he was assigned guardian.

Three of the sons of the said Captain were above the age of twenty-one, ~~when~~ the will was made, which was well known to the testator. Thomas Elwes, the second son, of whom no express mention was made in the will, took out process to call upon his father to shew cause why the administration to him should not be revoked as surreptitiously obtained, and on false suggestion, that all the legatees of the residue were minors, whereas the said Thomas had an interest therein, and was at the time when the administration was obtained of full age, and capable of taking it, and therefore by law ought to have had it.

The father alleged that the administration to him was expired, one of the sisters, viz. Philippe Elwes, being arrived at the age of twenty-one, and she the said Philippe appeared and prayed the administration might be granted to her; with whom seven of the minors by their guardian joined, and she alleged that the said Thomas had no right to the administration, he having no interest under the will, the testator having meant and intended by younger children only such as were minors when the will was made, and that this did appear from the directions he gave for the laying out the moieties of the residue on the maintenance of the legatees till they came to the age of twenty-one, and for the payment of their several shares when they should arrive at their respective ages of twen-

ty-one, which could not be understood to comprehend Thomas, who was above that age.

Per Curiam.

The question before me is properly on the grant of an administration *cum testamento annexo*. The question as to the legacy, whether any be due to Thomas or not, would have properly been moyed in the Arches; but it coming before me on the interest, I must give my judgment on the clauses in the will.

It appears that the deceased knew Thomas was of age at the time of making the will, and then it would be an absurdity in him to direct the payment of his legacy when he came to the age of twenty-one, whereas he was already past it. The expression of excepting the third son, looks as if he included under younger children, all but the eldest; but the other clauses plainly shew by younger children he meant the minors only; and therefore, if this matter was before me in the Court of Arches, on a suit for the legacy, I should be of opinion that Thomas had no legacy by the will; but now I am only on the grant of an administration, which I shall consider as a common case in which two in equal degree are contending, and in such case the constant rule is to grant administration to the greatest interest.

In the cause now before me, seven minors by their guardian come with Philippe Elwes, so that she has eight interests against one, and therefore I decree the administration with the will annexed to her.

CONSIST. LOND., TERTIA SESSIONE TRIN.
5th July, 1728.DR. HENCHMAN, *Judge.*ALESON, *Mulier, versus Aleson, Virum.*

In a suit for
necessity of mar-
riage, by reason
of impotency,
inspection re-
fused because
there had not
been a triennial
cohabitation.

Mrs. Aleson having been married to her husband six months, gave in a libel, setting forth that he was *frigidus et impotens*. The Court refused to admit it without she could specify some visible defect, there not having been a triennial cohabitation between them. Afterwards she specified—that libel was admitted, and he in his answer said the he had had carnal copulation with her. She then prayed the court would decree him to be inspected.

It appeared that he had been married to two wives before, with whom he had lived for several years, and they never accused him of insufficiency, but he had no children by them. Motion had several times been made for granting the said inspection. The judge at last declared he would not grant it; and seemed to think he was not obliged by law to grant it till after a triennial cohabitation.

PREROGATIVA CUR., TERTIA SESSIONE TERMI
MICHAELMAS, Die Novembris 13, 1729.*Coram DR. BETTESWORTH.**LUCAS contra LUCAS.*

Administration
granted to a
wife, under a
special power
from her hus-
band, who was
beyond seas.

Mrs. Lucas, widow, died intestate, leaving a son, and the representatives of three other children. The son, being at sea at the time of his

mother's death, knew nothing thereof; his wife prayed administration might be granted to her as attorney to her husband, and exhibited a general letter of attorney from him, by which she was authorized to take care of his affairs. Some of the representatives of the other children opposed the grant of the administration to her, and urged that, though administration is frequently granted to attorneys, yet there always is a special letter of attorney to that purpose, which is here wanting; and the general letter of attorney exhibited, bears date 21 years ago.

But the Court was of opinion that no other of the relatives of the deceased, except the husband, being entitled to administration by the statute, and he being so far distant that he could not possibly send a special letter of attorney, and the estate appearing to be perishable, the administration ought to be granted to the wife, as attorney to her husband, and decreed accordingly.

UPON NOTICE FOR A PROHIBITION IN THE
KING'S BENCH, NOVEMBER 11, 1729.

SMELRIDGE *contrâ* EDGWORTH.

A will was proved in the Prerogative Court, the executor whereof lived in the diocese of London; suit for a legacy under the said will was brought in the Arches. The executor moved for a prohibition, and suggested that he could only be sued for the legacy in the Consistory of London, for that, by the statute of citations, he could not be

Whenever a will is proved in the Prerogative Court, a suit under it for a legacy ought to be brought in the Arches, and not in an inferior court.

cited out of his own diocese; and that the Arches had no original jurisdiction; but the prohibition was denied by the whole Court, which was of opinion, that the Arches and Prerogative, being both courts belonging to the archbishop, the clause in the statute, saving the archbishop's prerogative, authorized the citation in this case into the Arches; and that the probate of the will having been of the archbishop's jurisdiction, every thing consequent thereon must belong to the same; and that, therefore, whenever a will is proved in the Prerogative, suit for a legacy under it ought to be brought in the Arches, and that it cannot be brought before any inferior Ordinary.

N.B.—This case was thus related to me by *Dr. Andrew*, who was counsel against the prohibition.

INFORMATIONS IN THE ARCHES, TERT. SESS.
TERMI MICHAELIS, 11me Die Novembris, 1730.

Coram Domino BETTESWORTH, Decano.

*WELDE alias ASTON, Mulier, contra WELDE,
Virum.*

In a cause of nullity of marriage on account of impotency, the charges of frigidity and absolute incapacity may be pleaded in the same libel.

Upon letters of request from Bristol, process was taken out of the Arches to call Mr. Welde to answer to his wife, who was daughter to Lord Aston, in a cause of nullity of marriage, *propter frigiditatem*, and this day the libel was given in; in the 4th article of which was laid a triennial cohabitation, and the rest laid an absolute incapacity *coeundi propter inhabilitatem penem erigendi*.

Dr. Henchman for Mr. Welde, observed, that this suit was founded upon the title in the Canon Law, *de frigidis et maleficiatis*—that the *frigidi* were those who have a latent incapacity *coeundi*, and the *maleficiati* were not persons bewitched, but those who have *partes male formatae*—that the law gives different directions in those two cases: in that of the *frigidi* a triennial cohabitation is necessary; in the other it is not—that the libel now before the Court took in both cases, and that the plaintiff ought to be restrained to one only—that if they would rest on the triennial cohabitation, they ought to lay specially at what places, and for how long time they cohabited in each particular case, because the *coabitatio triennalis* must be a *coabitatio continua*.

But the Court held that a triennial cohabitation does not require a living together *de die in diem*, but a general cohabiting only, as is usual between married persons—that it is not necessary to lay specially when, where, and how long in each place they cohabited, for that is proper matter for a plea on the other side. The Court was also of opinion that both the cases of triennial cohabitation, and the absolute *incapacitas ob defectum postestatis penem erigendi*, were properly laid, and admitted in the libel.

On this occasion, the case of Lewis and Lewis, before Sir John Cooke, in the Arches, in 1702, was mentioned, and said to be thus—A libel was given in before the three years' cohabitation were expired, in which no visible defect was laid, and therefore was rejected as too early; but when the three years were expired, divorce was had in that case.

ARCHES, QUARTA SESSIONE TERMI HILLARII,
15mo Die Feb. 1731.

Coram Domino BETTESWORTH, Decano.

*HON. CATHERINA ELIZABETHA WELDE, alias
ASTON, contrd WELDE.*

In a suit for divorce by reason of impotency, it is necessary that there should be either a triennial cohabitation or proof that the party is absolutely incapable.

Mrs. Catherine Elizabeth Welde, alias Aston, daughter of Lord Aston, libelled against her husband, Mr. Welde, *propter frigiditatem naturalem et perpetuam impotentiam*, pleaded that they had been married three years, during all which time he never had had carnal knowledge of her body, but that she was *virgo intacta, sed capax viri*, and that he *non potuit penem erigere nec fæminam penetrare et cognoscere*. Upon his answers to this plea, he swore that he verily believed he had consummated his marriage once or twice, but did admit that he had declared to the Duke of Norfolk, and others, that he had not consummated, unless that he thought and believed that he might have entered her once or twice, if that could be called consummation.

The lady prayed to be inspected by midwives, who returned that, to the best of their skill and knowledge, she was *virgo intacta*, and had never been carnally known by any man; and divers witnesses were examined, who proved that he had made frequent declarations that he had not consummated his marriage.

On the other hand he pleaded that, though they had been married three years, yet that they had not cohabited together so long as by law they ought to have done, for that she, during a great part of that time, had lived with her father, sepa-

rate from him; and also pleaded that he was capable to consummate his marriage, and prayed to be inspected by surgeons, which being granted by the Court, the surgeons returned, that he had all the parts of generation in a due and proper proportion, and that it did evidently appear to them he was capable to perform the act of generation.

And one Mr. Williams, a surgeon, who was examined on the part of the lady, swore that Mr. Welde had an external impediment, arising from the shortness of his *frænum*, which prevented an erection, but that it was now removed, he having cut the same, and swore, that he believed he was now capable to perform the act of generation *data occasione*.

The heads of the arguments by the Counsel, hinc inde.

Dr. Strahan, for the Lady.—The parties are of sufficient age to consummate, and the lady is admitted by him to be capable.

If the consummation was not consummated it was his fault; for it appears from his letters that he was welcome to, and well received by, Lord Aston.

The objection here is not that he has a visible defect, for then it would not have been necessary to have united for a triennial cohabitation—the impotency charged is the *non potuit penem erigere*, *nec fæminam penetrare et cognoscere*, and the proof of this arises from his own answers.

It must be admitted that the confession of the parties alone, by the Canon is not sufficient evidence, but joined with other circumstances, is very material; there are frequent declarations from him that he

had not consummated, and that he knew at the end of the year they must be separated.

In June 1729, he told Lord Aston that a surgeon had cured him of an outward impediment, but in the end of that month he told him what the physicians and surgeons applied to him signified nothing; for that, whenever he attempted to consummate, something came across him that shrivelled up his privy parts to nothing.

When his lady charged him with not having consummated, he said, "My dear, if it appears after three years that I have not consummated, we cannot in conscience live together."

Three midwives have returned upon oath, that, in their opinion, she is *virgo intacta*.

With respect to the surgeon's return, they can only speak to outward appearance, and it is not sufficient to take away the positive evidence arising from her being a virgin, and we therefore hope we shall have your sentence, pronouncing this marriage to have been null from the beginning.

Dr. Andrew on the same side.

Zacchæi Questiones Medico-legales, lib. 9, tit. 3. quæst. 1, nu. 2, nu. 5.

The first law that settled the time of cohabitation is in the Code 5 lib. tit. 19 de Repud. *Si maritus, &c.*; and that law made the cohabitation to be only two years, and that to be a *continuum tempus*, and not *de die in diem*.

If there be a doubt whether a man be impotent, or not, they must cohabit three years, and if in that time the marriage be not consummated, the law presumes impotency. Nov. 22, tit. 6, de Impotent. Gloss Gothof. nu. 9, 10.

An inspection, on which virginity is returned, and the woman's oath to the same purpose is full

proof.—Decret. 4 lib. tit. 15, c. 7. Decret. 2 lib. tit. 19, de Prob. c. 4.

Mr. Welde consulted Dr. Strolhan, but has not thought fit to examine him.

The words in the surgeons' certificate, that it evidently appears to them that he is capable, can be only as to outward appearance.

After triennial cohabitation, it is a legal presumption that he is really impotent, since he has not consummated the marriage in that time.

Dr. Paul, contrà.—There is nothing in the evidence but confessions.

The only question is, whether Mr. Welde is so incapable that he never can consummate. He says in his answer, he verily believes he has consummated, therefore it must be taken to be so; for if he had owned the contrary, he would readily have been believed, and the law does not require a consummation more than once.

If a man has been married, and hath consummated that marriage, and after in a second marriage is impotent, that second marriage is good.

A confession and rumour thereon is not by law a sufficient evidence, Dec. lib. 4, tit. 13, c. 5., and this, confirmed by the Canons of 1597, and by the Canons of 1603, no sentence of divorce can be given on the sole confession of the parties. 2 Modern Reports, f. 115. Collet's case. The Court said, prohibition should go to the Ecclesiastical Court, if they proceeded upon the confession of parties merely.

Mr. Williams, the surgeon, swears he believes Mr. Welde is capable to perform the act of generation *datus occasione*, not finding any thing ill-formed in his organs of generation.

Inspection of midwives is a fallacious proof,

Dec. c. 27, s. 1, no reason given by the midwives why they believed her to be a virgin.

The certificate from the surgeons necessarily implies that he had erection and immission—if a person can be made capable by the assistance of physicians and surgeons, no divorce shall be had. Dec. lib. 4, tit. 15, c. 3.

Dr. Henchman, on the same side.—If the parties should be separated, and marry again, and he should have children, they would be bastards, because the church plainly was deceived.

By Duck, *de Usu et Authoritate Juris Civilis*, the spiritual court, in spiritual cases, is to determine according to the Canon law.

According to Brissonius, *de Verb Signif*, and Calvin's Lexicon, *continuum tempus*, is what always runs without interruption; and, therefore, they ought to have cohabited together constantly for three years.

Judicium obstetricum est fallax. Decis. Rotæ Romanæ, Decis. 14. Verb. *quod Puella non valet consequentia*. The woman is a virgin, therefore the man is impotent.

Extrajudicial confessions, nor even judicial confessions, are any proof. When, in these cases, there are contrary oaths by the man and woman, as to consummation, *statur juramento viri*.

An inspection by midwives is not so sure as by surgeons: the one are skilful, the other are generally ignorant. The return of the surgeons upon their inspection, amounts to his being able, capable to do every thing necessary to generation.

One witness produced by the adverse side, is by law as good as a thousand on our side. Mr. Williams, who was produced by them, swears he has cured Mr. Welde of an outward impedi-

ment, by cutting the *frænum*, and that he is now capable.

Dr. Strahan, on the reply.—There is more than bare confessions, for we have the presumption of law from the triennial cohabitation, that he cannot consummate, since we have the lady's oath that he has not consummated, and the inspection by the midwives, which is the proper method of proceeding, for *inspectio matronarum* is the direction of the law.

Dr. Andrew.—The rule of law is *statur jumento viri, nisi ipsa velit se probare virginem per inspectionem corporis*. Dec. lib. tit. 15., *accepisti*, 1.

The spiritual courts are the sole judges in marriage causes and must proceed by their own rules.

A direct proof in this case is not necessary, because the defects are internal

Per Curiam.

This is a case of great consequence, and one which rarely happens, for this is the first instance of this sort that has ever been before me.

The only question is, whether the proof by law is sufficient to pronounce for a nullity of marriage.

The first proof relied on by the counsel for the lady is his confessions, which is not a satisfactory evidence. *Mascard de Probat. conclus.* 311.

By his answers on oath he denies that he is naturally impotent, and, therefore, that takes off the force of his extrajudicial confessions.

A three years' cohabitation is, in these cases, required by law: the parties have been married three years, but a great part of that time have

been absent from one another, but a triennial cohabitation is so requisite, that if the parties are necessarily absent, the man is to be restored as to that time during which he has been absent.

Dec. lib. 4. tit. 15. Laudabilem.—Gloss. eod. Mascard de Probat. conclus. 890. Christianus de Repud. vol. 5.

It is said that by the midwives' certificate she is found to be *virgo intacta*, and that is sufficient, but the return is only, that in their opinion she is so. By Causa 33, 9, 1, and Clarke's Praxis, it is necessary that the man should have a visible incapacity in order to annul a marriage before a triennial cohabitation.

The best evidence arises from the inspection of the man. Abroad in foreign courts they have a more solemn inspection than we have, called a *Visitatio*, which is performed by surgeons, in presence of the judges and parties; and formerly in France they used the *Congressus*, but that method was abolished by the parliament of Paris in the year 1665.

It is necessary that it should appear to the court not only that Mr. Weide was impotent, but that he is so now; for where there is a probability of capacity the court cannot separate parties.

The libel was given in a year before; he pleaded capacity; but then upon inspection had of him thereon, the surgeons have returned that he has his parts of generation in proper proportion, and that it evidently appears to them he is now capable. And Mr. Williams, the surgeon, swears he has removed the impediment he before lay under.

If the parties should be divorced, and both should marry again, and he should have children by the second marriage, these second marriages

must be by law set aside, and the first marriage declared valid, for when the church appears to have been deceived, the sentence must be revoked. Dec. lib. 4. tit. 15. c. 6. et Gloss. eod.

I am therefore of opinion, there has not been the three years' cohabitation required by the law, and also that it does not appear from the evidence that he is absolutely and naturally incapable to perform the act of generation.

The court then gave sentence for Mr. Welde, and decreed a monition against her to return to and cohabit with her husband, by the first session of next Easter Term.

This sentence was confirmed by the Delegates on or about April 1733.

PEAKE v. BARNE.

K. B. Mich. Nov. 19, 1732.

Prohibition to the Ecclesiastical Court for libelling against a man for serving without Licence as a parish clerk, in Cripplegate, London.

A Deputy Parish Clerk may act without a Licence from the Ordinary.

The case was that the man was deputy to one who was a licensed parish clerk there. The court held that the deputy in this case might well act without a licence, and therefore prohibition was granted *per totam Curiam*.

PREROGATIVE, HILARY TERM, 1725-6.

DR. BETTESWORTH, *Judge.*RICHARDS *contra* RICHARDS.

A nuncupative
will not estab-
lished.

This case was concerning a nuncupative will. Mr. Richards, the party deceased, said, the day before his death, he then being *ill and infirm*, to George Richards, his reputed son, (whose legitimacy was not allowed by the next of kin, who opposed the nuncupative will) that he would give him his estate. The words used by the deceased were these: "*Do you see, George, thou shalt have all my estate, I give it to you, but you shall pay some legacies out of it;*" and concluded with saying, "*Do you see this is my will?*" He did not name *any of the legacies*, and *part only* of the words (leaving out, "*I give it you,*" and "*Do you see this is my will?*") were reduced to writing, and sworn to by *three* witnesses. The question was, whether the words above-mentioned would amount to a nuncupative will.

Dr. Henchman, counsel against the will, objected that the probate of a nuncupative will, by the statute of frauds and perjuries, ought not to be extracted till there was a *process* from the Court, to *cite all who have an interest to appear*; and that, therefore, for want of such legal process, according to the statute, though all the parties concerned were *voluntarily* come into judgment, and had made *themselves parties* in the suit, yet all the proceedings, with relation to this will, would be *null and void*.

Dr. Andrew on the same side, said, that a nun-

cupative will was not be *favoured* by the law, but every thing was to be taken in the *strictest sense against it*, and therefore, the statute being express that a process should go out before any probate could be granted, all the proceedings for want of that form must be null.

The Court overruled this objection, because the end, for which the statute requires a process, was fully answered by all the parties concerned, being already in judgment, to contest the will.

Dr. Pinfold, for the will.—The intent of a nuncupative will is not to be taken from the *schedule*, but from the *witnesses*. The testator's *intention* only is to be regarded. No nuncupative will is valid, unless proved by three witnesses *at least*, present at the nuncupating, provided the estate bequeathed exceeds thirty pounds. A nuncupative will must be made in the *last sickness* of the testator, and must be reduced to writing within *six days* after uttering the words, all which requisites have concurred in this case.

Dr. Phipps on the same side.—It is no objection that the words of the nuncupation are in the *future tense*, for *hæres erit* or *hæres esto* are the same thing, L. quoniam, 15 C. de Testam. By statute of frauds, no testimony can be admitted to prove a nuncupation after six months, unless the *substance* of the nuncupation was reduced to writing within *six days* after the speaking.

Dr. Sayer on the same side.—The statute says, no nuncupative will for above thirty pounds is good, unless proved by *three* witnesses; another requisite is, that such will shall be made in the

last sickness of the testator. If the testimony for the will be brought *within six months*, there is *no necessity* to reduce the words into writing *within six days*. There may be a *nuncupative codicil* to a *written will*. These words, "*Take notice, this is my will*," contain publication of the will *only*, and therefore not necessary to be made part of the will, as contained in the schedule; yet they being sworn to by *four* witnesses *within six months*, it is sufficient.

Dr. Paul against the will, for one Mrs. Mary Richards.—Nuncupative wills are not favourable; in proving an *animus testandi* it must be shewn that such an *animus* relates to the *will propounded*. The witnesses to a nuncupative will must be *convocati ad hoc* by the statute; and Wentworth's Office of Executors, page 8, a nuncupative will is properly made only when the testator is *in extremis*, so that he has no time to make his will in writing.

Dr. Kinaston on the same side.—*A rogatio testium* is necessary in a nuncupation: *testamentum est quod quisque fieri velit*: the statute of frauds and perjuries, founded on *L.17. lib. 6, tit. 21 C.*

Dr. Henchman.—There must be *express* words of giving, to shew an intention of bequeathing, in a testator.

Dr. Andrew.—A witness *in law* may be a witness to a nuncupative will, but they are not good witnesses who are *interested*, or appear to have perjured themselves.

The Court was of opinion that it did appear from these words in the pretended nuncupation, "*You shall pay some legacy*," that the testator did

not design this to be a nuncupative will, but only a declaration, that he intended to make a will, by which he would give his estate to George; because, since he had mentioned legacies, if he had intended the above-mentioned words should contain his will, he would have *specified* the legacies; and it appearing also that the witnesses for the nuncupation were somewhat *interested*, and that they had *contradicted* themselves in their evidence, the Court pronounced against the nuncupation, that it was not valid as a nuncupative will.

This cause was appealed to the Delegates, and the sentence was there confirmed by the whole Court, on 4th February, 1733-4.

ARCHES CUR., TERTIA SESS. HILL 1727—8.

DR. BETTESWORTH, *Dean.*

CREMER *contra* DAKINS.

Robert Dakins by his will appointed William and Samuel Dakins and another person his executors, and did therein bequeath several legacies, some of 100*l.* some of 50*l.*, 25*l.*, 10*l.*, &c. and did, *inter alia*, devise in manner following:—"I give to my wife Mary the rents, issues and profits of all and every my messuages or tenements whatsoever, for and during her natural life; and after her decease, then I give all my messuages and tenements to my executors and the survivor or survivors of them, in trust that he or they shall then sell or dispose of the same, and the monies arising by sale thereof to be divided to and amongst all my

Question raised
whether the
shares of de-
ceased legatees
descended to
their represent-
atives, or went
to the executors
or to the surviv-
ing legatees.

legatees herein before mentioned, in proportion to their several legacies which I have given them, and all the rest, residue, and remainder of my estate consisting in ready money, moneys at interest, lottery annuities, or other government securities, or otherwise howsoever, I give to my executors in trust to pay to my wife the interest and produce thereof during her life," and after her decease he directed that they also should be divided amongst his legatees in the same manner as before.

Several of the legatees died, leaving the wife: after her death, the question was, whether the shares of the deceased legatees should descend to their representatives or the surviving legatees, or should fall to the executors of the will? An information in law was prayed and granted by the Court upon this point, Whether the legacy of the residue vested in the several legatees immediately upon the death of the testator, or whether their interest did not vest till the death of the widow?

ARCHES, SECUNDA SESIONE PASCHÆ,
14th May, 1728.

DR. BETTESWORTH, *Judge.*

CREMER *contra* DAKINS.

The Court having heard counsel on the point of law with regard to the legacies in this case, in which the arguments turned chiefly on the distinction of *dies veniens* and *dies cedens*, the judge was of opinion that the testator never intended that the legacies should in any case fall into his

executors. As to the representatives of the deceased legatees, he was of opinion they had no title, for the said legatees having died before the widow, their respective legacies had not vested in them; for which reason they could not transmit them to their representatives. He compared this case with that of *Honour and Godden*, in the Arches, May 2nd, 1726, and decreed that the legacies to the deceased legatees should go to the surviving legatees as joint legataries.

—
ARCHES CUR., TERTIA SESSIONE TRIN.
July 2, 1728.

DR. BETTESWORTH, *Dean.*

ROBINSON, *Mulier, versus ROBINSON, Virum.*

This cause began originally in the Arches by consent of the parties, who were subject to the jurisdiction of the Consistory of Exeter. Mrs. Robinson sued her husband for cruelty and adultery, and prayed a sentence of divorce. It appeared in evidence that he had, from the time of the marriage, treated her with a great deal of ill-nature; that he frequently fell into violent passions, at which times he abused and called her names, by which means he had so excessively frightened her, as to occasion several fits of sickness; and that when she was sick, he refused her all proper assistance, and in every respect behaved as a very bad husband, except beating her, with which he was not charged. It appeared that on the day of the marriage he left her without con-

The admission of a husband to an allegation of faculties is to be taken strongly against him. Permanent alimony allotted. The wife directed to retain such of her paraphernalia as were in her own possession.

summating, and did not come to cohabit with her till several months after. The adultery was proved by Mrs. Drake, by whom he had had a child ; her evidence was opposed as a *particeps criminis*, but she was backed by other witnesses, who deposed to his taking lodgings for her, to the birth of the child, and his owning it for his child, and taking care of it.

The Court was of opinion that the cruelty and adultery were fully proved, and pronounced for a divorce, and condemned him in 50*l.* costs. In this case an allegation was given in, setting forth his faculties, which amounted according to that, to between two and three thousand pounds per annum. Mr. Robinson confessed it *modo et forma*, with a protestation that he did that because he was not able to pay the expence of examining witnesses to it. When the cause was heard he stood excommunicated for not having paid twenty pounds costs, according to the decree of the Court; so that his counsel could not be heard.

The Court said, that his confession of faculties was regularly to be taken strongly against him ; but he having confessed the allegation, with a declaration that it was done only to avoid expences, and there having been no plea on his part as to that matter, it was not clear to him that his estate was so large as pretended ; that as to the lady's fortune, it was only 6000*l.*, 150*l.* per annum of which was in reversion, and not yet come to the husband : and I therefore decreed 200*l.* per annum to be paid quarterly for alimony, and decreed a monition to him to pay her 400*l.* for two years' arrears of alimony, from the going out of the process to the time of sentence, she having received

no alimony during the suit; and also decreed that she should retain such of her paraphernalia as were in her possession, but would not admonish him to deliver her the rest which were in his custody.

PREROG. CUR. SECUNDA SESSIONE TERM.

MICH. Novembris, Die Sexto, 1728.

DR. BETTESWORTH, *Judge.*

MOORE *contrâ* PAINE.

Susannah Selwyn, deceased, by her will appointed her sister, Mrs. Moore, and one Paine, joint executors; she gave the bulk of her fortune to Moore, 100*l.* only to Paine, and bequeathed several legacies to other people. Moore opposed the will. It appeared that the deceased was entirely blind. There were three subscribed witnesses to the will, but only one of them (viz., the writer, who was of entire credit, and wholly unconcerned as to the event of the suit,) could account for the instructions, for the reading of the will to the testatrix, and her approbation of it, and for the identity of the paper; the other two only depositing to the publication of it by her as her will, but they did not hear it read to her, nor did they know the contents of it. The capacity of the testatrix was fully proved, and that she had made a former will, which differed from this chiefly in the quantum of the legacies, which were smaller in that than in this.

An information in law was granted upon this point, Whether one witness of entire credit is suffi-

By the *jus gentium*, one witness to a will is sufficient, but there should be some circumstantial proof to corroborate that witness.
The will of a blind person holds to be sufficiently proved.

cient to prove the will of a blind person ? It was insisted, against the will, that the solemnities required by the civil law (though not the same number of witnesses) were necessary to establish the will of a blind person, and that unless it was read over to such testator, and approved by him in the presence of two witnesses, at least, of entire credit, and who could depose to the contents of it, could not be valid, and to this purpose the commentators on *L. hac consultissima (qui test. fac. possunt,)* and Swinb. of Wills, Part 2. § 11, were cited.

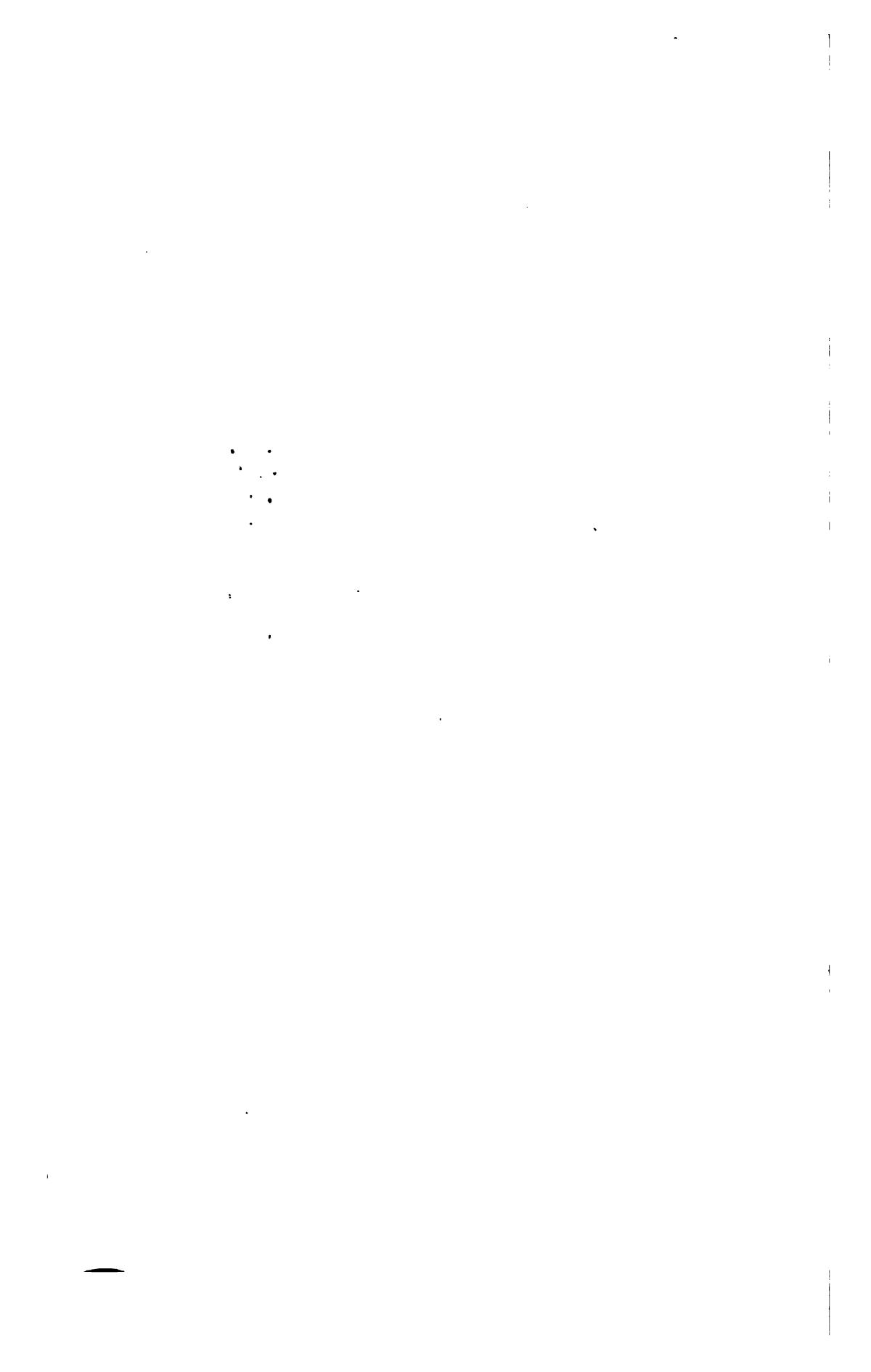
On the other side, it was insisted that the *Law hac consultissima* had never been received in England ; that all our wills stood upon the *jus gentium*, and that by the *jus gentium* one witness was sufficient to prove the will, even of a blind man, which Swinburne also declared in the Latin note upon the said chapter. The case of *Millett and Wadham v. Fabian*, in the Prerogative, anno 1688, was cited thus :—" Nicholas Efford being blind or dim of sight, (for in that particular the Counsel differed) sent for one Russell, a clergyman, to make his will, who would have excused himself, and desired the testator would send for a lawyer ; to which he replied that he could not see, and the lawyer might impose upon him by reading one paper to him for his will, and making him publish another ; whereupon Russell made his will, which the testator published in the presence of two other subscribing witnesses, who were not present when it was read to the testator, nor did they know the contents." This will, which therefore stood only upon the evidence of Russell the writer, was confirmed in the Prerogative ; and the sentence, upon appeal to the Delegates, was affirmed there.

Per Curiam.

There is a difference between the Counsel concerning that case of Efford, whether he was quite blind, or only dim; but I have looked over the process, and find he was utterly blind, and that the matter rested entirely on the evidence of the writer, and it is therefore, in all circumstances, a case in point with this before us.

I am of opinion, that the solemnity of the civil law is not requisite with us; the proof of our will is by the *jus gentium*, and by that law one witness is sufficient; and of this opinion is Swinburne, in the note cited, who concludes with these words — *Et hanc opinionem recepit generalis regni nostri consuetudo.* There should be, indeed, some ministerial proof to corroborate the witness, which, in this case, arises from the conformity of the former to the present will, and from a declaration which it appears in evidence she made, that she believed some of her relations would not approve of her will, which was some sort of recognition of this will. Upon the whole, the Court was clearly of opinion, that the will in question was sufficiently proved, and accordingly pronounced for the validity thereof.

N.B. This cause was appealed to the Delegates, where the sentence was confirmed, June 28. 1733.



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23 H. 8. 13, 14, 15. 287. 314. 316.

1 Eliz. 13. 15.

5 & 6 Ed. 6. 18, 19. 514.

31 Ed. 3. 51. 296.

21 H. 8. c. 5. 51. 295, 296. 414. 560.

22 & 23 Car. 2. c. 10. 51, 52. 414.

W. 3. 89. 98. 274. 324. 244.

13 & 14 Car. 2. 168. 176.

13 Eliz. c. 20. 120, 191.

14 Eliz. c. 11. 190.

18 Eliz. c. 11. 190.

12 Car. 2. 330. 545.

36 Ed. 1. 375.

1 Jac. 2. c. 19. s. 6. 388 *and n.*

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Pronounced against for want of adequate capacity, 240.

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Cannot be set aside by the Court of Chancery, 263.

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Will made to secure a debt entitled to probate, though the testator styled himself a mariner, it being only an actual mariner who is entitled to the benefit of the statute of W. 3. 324.

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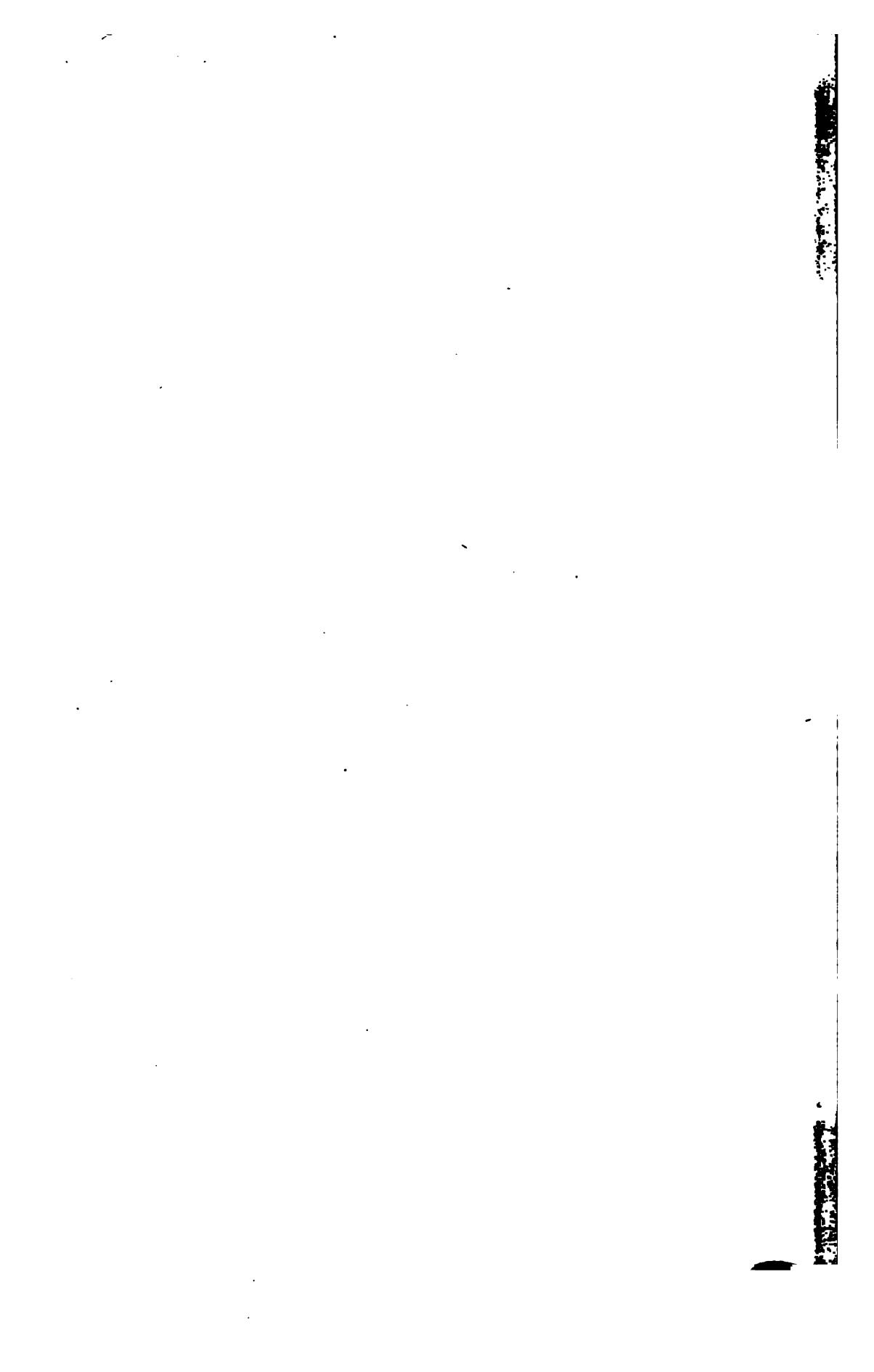
Witnesses, against whose general characters there is no exception, are not to be rejected on conjectures and suspicions, 474.

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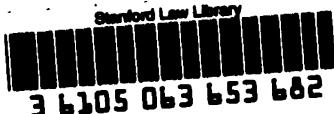
Erroneously examined *vivâ voce* in an ecclesiastical court, *App.* 569.







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